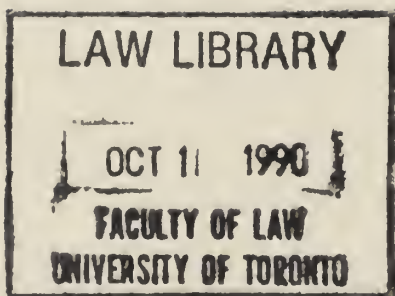


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FISHERIES POLLUTION REPORTS
VOLUME 2 AND RECOPIED VOLUME 1

CASE LAW:
PROSECUTIONS UNDER THE POLLUTION CONTROL
PROVISIONS OF THE FISHERIES ACT

Prepared by
Environmental Protection Service
Environment Canada

VOLUME 2

Edited by
Michael J. Hardin
John E. MacLatchy
Robert E. Tourangeau
October, 1980

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FISHERIES POLLUTION REPORTS

CASE LAW: VOLUME 2

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Environmental Protection Service
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October, 1980

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Robert Tourangeau

REGINA v. COLUMBIA CELLULOSE CO. LTD.

British Columbia Provincial Court, Ward, J., Prince Rupert, September 3, 1970

Environmental law -- Water pollution -- Sentence -- Fish kills resulting from oxygen depletion caused by pulp mill effluent -- Charges brought after legislation amended to provide for greater penalty -- Maximum fine not levied -- Three thousand dollar fine imposed -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

The accused plead guilty to a charge of contravening s. 33(2) of the Fisheries Act when a break in its effluent disposal pipeline caused the release of large quantities of waste which resulted in large fish kills because of the depletion of oxygen.

Held, the accused was fined three thousand dollars. Although the offence was a most serious breach, the maximum fine was not imposed. Even though the Crown alleged that the accused has been polluting the water in question for some time, it had failed to bring the charges until after the legislation had been amended to provide for greater penalties than before.

Environmental law -- Water pollution -- Sentence -- Order to refrain -- Negotiations on-going between accused and government officials to remedy pollution problem -- Effects of shut-down of plant on local economy considered -- No order made -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(7).

Digby Kier, for the Crown.

Charles Locke, for the Accused.

Mr. Kier This is for the record, I believe. My name is Digby Kier. My friend, Mr. Locke, appears on behalf of the Columbia Cellulose Ltd.

INFORMATION READ.

Mr. Locke Your Honour, my name is Locke. I am representing the Company and I wish to enter a plea of guilty.

Mr. Kier Your Honour, the Crown is alleging one offence and one offence only, between these dates. The charge is between these dates, but the offence is broken up in that period and the Crown is alleging only one offence.

Now, just to give you some background of this matter, if I could outline that. This summer, as we all know, the mills out there were shut down at Port Edward for a labour dispute, and when they started up again, the Department of Fisheries made tests of the effluent going into Wainwright Basin and into other bodies of water there, such as Porpoise Harbour and they had various control stations set up where they could sample the water in and around the Mill, and they discovered that a large portion of the, in fact if not all the effluent from these two pulp mills at Port Edward were going into Wainwright Basin. The Company had a pipeline, does have a pipeline from the

Mill underneath Porpoise Harbour to Ridley Island and to Chatham Sound. That pipeline, through no fault of the Company, has been breaking down because that pipeline is polyethylene and cannot stand the various temperatures and pressures for what it was designed for. Some of the effluent going through that pipeline during this period went from that pipeline to Porpoise Harbour.

Judge

There was a leak.

Mr. Kier

Yes. And I am sure my friend could tell Your Honour what proportion, what the costs have been to repair that pipeline, to stop the effluent going through the pipeline and push it out towards Wainwright Basin. The main study the Fisheries was concerned with, was the fish kills in Wainwright Basin. The Mill started up on the 24th of July, Your Honour. This is the approximate start up date, when it got to full operation, and by the 28th of July, there was the first indication of fish kills involving herring, flounders, salmon molt and sculpions and other species in Wainwright Basin. On the 29 of July, fish kill was found to be in Porpoise Harbour where the existing pipeline was because of a break in the pipeline. On the 30th of July, there was extensive fish kill in Porpoise Harbour and Wainwright Basin. There were large leaks in the pipeline, etc. and again on the 31st of July. Now, samples were taken of the oxygen content in the water. The reason for the fish kills is lack of oxygen in the water. This has come about because of the effluent which gets into the sea water. This effluent requires a certain amount of oxygen per day to break down and decompose it. By itself it takes out a large amount of oxygen and thereby leaving none for the fish. At the two stations in Wainwright Basin, the fisheries people started taking the oxygen content of the water and at normal conditions, the oxygen content will vary with the temperature of the water, etc., and normally varies between seven and a half and eight and a half parts per million dissolved oxygen in water. Studies in Wainwright Basin from July 23rd to August 3rd were taken and on Wainwright Basin there is two sample stations, one in the middle, No. 17 - I have graphs for this - and one at Zindardi Rapids, closer to where it enters the Rapids going to Porpoise Harbour, No. 19. Both graphs pretty well show a 45 angle of decline. I have shown my friend a copy. There is a 45 angle of decline. The oxygen over these days from July 23rd on, when the Mill started operation, by the 29th of July, both stations showed there was .5 parts per million, oxygen in the water, and it is upon reliable estimate by the biological experts, that the minimum oxygen required by the fish, just to exist, is 5 parts per million. In any sustained activity by fish, as spawning, to survive this is down to half parts per million and this is consistent with when they found the first indication of fish kills. If I could file this graph which reveals from the 29th of July on roughly, the .5 parts per million going to one and a half on the 3rd of August. Now, the quantity of the effluent actually being put in there from these two mills in a given day requires 742,000 pounds of biological oxygen every day, b.o.d., that's the total

amount required to neutralize the effluent. 742,000 pounds of biological demand that's b.o.d.

Judge

This is the weight of oxygen, this is the figure.

Mr. Kier

That is correct. It is a tremendous amount, and that is why the water in Wainwright Basin was almost taken right down to nil, and I have, I want to file these photographs of the Mills. I have shown them to my friend. There are a number that show the effluent when it comes from the Mill. We are mainly concerned with the main Wainwright Basin and the pictures show the effluent in these ponds. There is a dead skate, which is a fairly large fish, in one of the ponds; herring in another. I believe there is sixteen all together. It is a large quantity of oxygen that is required just to neutralize, to satisfy this effluent demand in the water when it goes in there. I want to point out another thing, through the labour dispute, this pipeline across Porpoise Harbour and through to Ridley Island, if the strike had not taken place, this pipeline, it is planned to rebuild it with a different pipeline that would be operational. Even so, if that was operational, that wouldn't take the full amount of effluent from the Mill into Chatham Sound where it can be disposed of easily, still some would be going into Wainwright Basin, and even if that pipeline were fully operational, certainly there have been negotiations before this time with respect to what the Company can do to clean up this pollution, and there has been constant negotiation for sometime and there still is. I might say the Company now appears to be fully co-operative in its efforts to really look at this effluent problem and contain it, but there was this strike, and the situation too has been existent for sometime. This Wainwright Basin has been known to the Fisheries. There were fish kills in 1968 as well. This effluent, it is a liquor effluent that comes out of this mill and of course, some solids are in Wainwright Basin, in the settling ponds, you can see where the solids have gradually accumulated and it will be quite a matter to clean it up, and my information is that this pipeline will remove, and my estimate, I stand to be corrected, they will be able to remove approximately 75 to 80% of the effluent when that pipeline is put in.

Judge

This is into Chatham Sound.

Mr. Kier

Yes. They had one pipeline that has been breaking down that removes 370,000 pounds of b.o.d. per day and the new pipeline, when it is put in, will be built to remove 620,000 pounds per day and, according to our figures would leave 122,000 pounds of b.o.d. going into Wainwright Basin per day. The Company is anxious to clean that matter up as well, Your Honour. I don't think I can usefully add any more. Those are the facts I have, Your Honour, and I want to point out the amount of hours that have gone into this investigation. The Department has calculated it has taken the equivalent of one man working a year. They started primarily this year in January and continued with the work, one man per year, I calculated that to be 1900 man hours' work involved in this work on the effluent, so that is

the amount of work the Department of Fisheries has put on this thing, and they have had, of course, I don't think I have to speak on that now. They certainly intend to have the full co-operation of this Company now, which they did not have in the past. Those are the facts. I want my friend to reply on the facts, and I would like to speak later as to sentence, if I would be permitted to do so.

Provincial Judge One point, you mentioned constant negotiations. Who with?

Mr. Kier With experts from the Columbia, I am sorry, Department of Fisheries, experts from the Department of Fisheries down there, and with, I believe, Dr. Becker from the Company. They have had outside consultants. There is a lawsuit pending between The Columbia Cellulose and the Department as to who is at fault and apparently the Company had outside consultants to say this pipeline would be satisfactory. There is a third party involved as I understand it.

Mr. Locke Your Honour, I would like to call one of the senior Vice-Presidents of the Company. Your Honour, Mr. Guimond is the senior Vice-President of operations of the Columbia Cellulose and affiliate companies. I think the history of this matter goes back for some years and it is not always easy to obtain all pertinent dates, and there are dates and times that I would like to give the Court and to that end, I have had prepared, under Mr. Guimond's supervision, a typed statement and if he might be permitted to read from it, and I would give the Court a copy.

Provincial Judge Did You say Columbia?

Mr. Locke He is the senior Vice-President of operations of the Columbia Cellulose and affiliate companies. He is called on behalf of Canadian Cellulose Co. Ltd. The words you will find in here, you should substitute the words Canadian Cellulose. There have been certain intercorporate changes of the Company which are insignificant to the Court. I will call Mr. Guimond. I have a copy of the statement for my friend.

Mr. F.X. Guimond Sworn

- 1 I am the Senior Vice-President, Operations of Columbia Cellulose and have been so since September of 1969. I have been in the pulp and paper industry for approximately 38 years. I am a chemical engineer and I have held positions through the years in management capacities with Quebec North Shore Paper Company, Canadian International Paper Company, Brown Company, Prince Albert Pulp Company Limited, including positions in technical, operations and managements. I have been in management for almost 20 years but I have kept myself closely abreast with most of the technical developments in the pulp and paper field. I have operated sulphate and sulphite mills and am familiar with the technical processes of both.

- 2 The Columbia Cellulose sulphite mill produces high alpha dissolving pulp and was constructed in 1951. The sulphate or kraft mill came on stream in 1967.
- 3 I am personally physically familiar with both mills, with the technical method of operation, with the effluent disposal system, and also have examined and am familiar with the bodies of water such as Wainwright Basin and Porpoise Harbour into which some of the waste from the mill discharges. Many of the facts I will relate are hearsay as coming from the records of the Company, but they can be verified from them and I have, through talking to individuals and references to the records, assured myself that these facts are correct. As some of these events go back several years, a number of the witnesses who might otherwise be available, are no longer with the company and there is actually no one that can give a complete story except probably someone in my position.
- 4 The complex of the two mills produces waste of three broad types: Sulphite waste (red liquor), Bleach plant waste (from the sulphite mill) and Kraft effluent. Much of the kraft mill waste is recovered in the recovery boilers.
- 5 In 1961 or 1962 the Fisheries Department drew to the attention of the Company the relatively high level of discharge of sulphite wastes into Porpoise Harbour and Wainwright Basin. Discussions continued and in 1965 when the kraft mill construction was underway the Company and the Fisheries Department discussed various systems for effluent disposal in view of the fact that the kraft mill waste would impose an added burden. Eventually a system was arrived at which received the approval of the Fisheries Department on the assumption that it would solve a number of the problems particularly objectionable to them. The scheme involved the installation of two new red liquor washers plus a 12 inch effluent discharge pipe to run from the plant under Porpoise Harbour, over Ridley Island and discharge into Chatham Sound at a point selected by the Department of Fisheries.

Provincial Judge What is ment by liquor washers?

Mr. Guimond Perhaps I should explain some of the processes of the plant.

Provincial Judge Just briefly.

Mr. Guimond Chips are cooked by the digester in a big container. When the mass reaches a certain degree of cooking, it is discharged into a large tank. The mass is then pumped over or vacuum filtered into drums 8 feet in diameter, some 16 feet long. That is to separate the fibrous material or red liquor in this case, and the idea is to separate the fibrous cellulose material from this liquor and this is the liquor that we are continuously referring to in our problem.

- 6 Engineering advice by consultants, after extensive study, was to build with polyethylene pipe. This was ordered from Dupont Canada Limited.
- 7 Installation of both washers and the pipe was started in 1966. The washers were completed in 1967 without incident and have continued to function satisfactorily. The history of the pipeline is, however, as follows:

- a) Completion was delayed until February, 1968 because of a disastrous dock fire. This pipeline, incidently, follows along the dock and goes underneath Porpoise Harbour and this is the serious fire in 1968 which delayed the construction of the pipeline.
 - b) The Porpoise Harbour section suffered several breaks and a project was started in September, 1968, to replace this section of pipe with 16-inch polyethylene pipe. Completion was scheduled for December, 1968, but was delayed until February 1969 by a severe winter.
 - c) The Ridley Island section continually developed leaks and breaks which required a full time crew for detection and patching. A project to replace this section with fiberglass pipe was started in September 1969, and was scheduled for completion by April, 1970. Strikes have delayed completion until September, 1970. We expect to have this section completed this month.
 - d) Failures continued to occur in the already replaced Porpoise Harbour section and after extensive engineering studies, a contract has been let to replace it with 20 inch fiberglass pipe with a completion date of November, 1970.
- 8 During all the above, the Company has been advised in every respect by consulting engineers of the highest ability. The system has been upgraded by installing larger pipe and improvements in the pumping system.
- 9 Columbia Cellulose or Canadian Cellulose, has been legally advised that the Dupont Canada company is responsible to replace the broken pipe but after extensive negotiation came to nothing, action was commenced against the Dupont Company in the Supreme Court of British Columbia on the 13th day of August, 1970.
- 10 The total cost of the pipeline system is now in excess of 2.5 million dollars.
- 11 Since the time the first technical and engineering studies were instituted in 1965, the company has contemplated and actually planned for two other facets involving the reduction of wastes. There are:
- a) In-plant fibre recovery in both mills. Technical and engineering work has started in early 1970, including studies by several equipment suppliers. Various parts of this program are being started in 1970 and 1971, with completion dates expected in 1971 and 1972. The estimated total cost of this will be in excess of one million dollars.
 - b) Out-plant removal of suspended solids has been under technical and engineering study since 1969 and various facets are to be started in 1971, with completion date expected in 1974. Consultants were engaged in early 1970 and the estimated cost is 2.7 million dollars.
- 12 The Department of Fisheries and the Pollution Control Branch have tentatively agreed that the program outlined above - that is, rehabilitation of the pipeline

system, in-plant fibre recovery and out-plant fibre recovery - should solve the pollution problem in Wainwright Basin. Columbia Cellulose has agreed that if this program does not reach the desired objectives, further treatment will be installed. Our effluent treatment program requires approval by the B.C. Pollution Control Branch and the Department of Fisheries before we can finalize our plans.

- 13 In addition to the above, the Company has been studying the possibility of sulphite red liquor burning. Several changes being made to the mill are essential for liquor recovery. These include the conversion to ammonium base completed early this year, installation of heat exchangers on the digesters and the installation of a large blow tank. These projects will total over 2 million dollars. The burning of ammonium base sulphite liquor is still in the very early stages of development. Our engineering department is evaluating many types of equipment that would work and also be compatible with long range objectives. Cost estimates for the systems run as high as 15 million dollars.
- 14 The Company would respectively point out the following:
 - a) Columbia Cellulose's losses in the last few years have amounted to more than 20 million dollars. The earnings of 1.4 million in the last year have come primarily from the Castlegar operation.
 - b) All the above pollution control programs involve the expenditure of over 8 million dollars. Major money had already been committed to this program prior to August, 1970, notwithstanding the obvious adverse effects on the Company's revenue of a 64-day strike. At the present minute, the Company's interior mill is shut down because of labour troubles common to the whole industry.
 - c) At the time these mills were built, they were welcomed into the community as the major employers of labour in the area and were built according to the technical standards of the time. It is further pointed out that the direct salaries paid to employees and total dollar volume expended by the Company in the Prince Rupert and Terrace area, amounts at an intelligent estimate to about 28 million dollars a year.
 - d) It is our understanding that even before the pulp mill was built, the direct or indirect contribution from fish in Wainwright Basin has been an exceedingly small percentage of the Prince Rupert area fishing industry. It is certainly far below the dollar input of the mill and even far below the 1.5 million dollars in municipal taxes paid each year by the mill.
- 15 When these mills were built, they were built according to the accepted technical standards of the day and the Pollution Control Authorities. Recently pollution control activity has been obviously stepped-up, but older mills must have time to earn the money to make the installations which will satisfy today's new standards.

In their Brief to the recent Pollution Enquiry, the Department of Fisheries made the following statement:

"Also new standards must be introduced in a predictable way. They must be capable of attainment, given the present state of the art, and they must be enforceable without creating undue financial hardship in the forest products industry in B.C."

- 17 The Company has had a pollution control program for many years, with the effort intensified in the last two years. As outlined above, we have spent over 2.5 million dollars to date and will spend an additional 5 million dollars in the next 3-4 years on water effluent control at Watson Island. This program has involved intensive contact with the Department of Fisheries including many meetings, a great deal of correspondence, phone contacts and co-operative testing programs at the mill. Our last formal meeting was held in Vancouver on June 4th to completely review the status of our effluent program. We informed them of the recent mill startup date so they could carry out tests.

We had thought that the Department of Fisheries was completely informed of the Company's plans, but perhaps in view of the present prosecution, this was not so. This is, no doubt, our fault and is regrettable.

September 3, 1970.

Mr. Kier I have no questions, Your Honour.

Mr. Locke Your Honour, I would like to say something about sentence. Perhaps my friend is going first.

Mr. Kier Your Honour, Mr. Guimond did mention the value of this pulp mill to the community and there is no question that it is a valuable aspect here. I am advised that the main fish involved here in Wainwright Basin are herring and they don't fish for herring in Wainwright Basin but they go through there and the herring industry was a \$600,000.00 industry in this area, and there is not much of a herring industry left any more in the last year or two. Of course, you can't lay all the blame on Columbia Cellulose. There are other factors involved, but certainly the position of the Crown is, and this is, of course, why we are here today, is that the pollution will have to be rectified. I might say I am instructed, in speaking to sentence, of asking for the maximum fine, which under the act is a summary conviction and Parliament has seen fit to set a maximum fine not exceeding \$5,000.00, and the Crown is alleging one offence here. In my submission, I would say, Your Honour, that the large amount of effluent going into this body of water, Wainwright Basin which is almost land locked, there are rapids on both ends, and there is water right next, adjacent to the mill and it seems to be an accessible place for the mill to dump their effluent resulting in fish kills and this, to my mind, is a fairly severe breach of the Fisheries Act. This is, of course, a new section and came into effect July 15th of this year, but is not too different from the old section, Section 33, the deleterious substance section, and this has been modified this year. The law has always been the same. The company did make some effort and took some steps to control this pollution, but the facts speak for them

selves, when you have this total quantity of 742,000 lbs of b.o.d. per day from these mills and the existing pipeline capable of only taking away about half of that, that it is a fairly serious matter and that is why the Crown is asking for the maximum penalty. I am sure Your Honour is aware of the various aspects of sentences laid down by the various Courts, and the Court of Appeal. In this situation, it appears to me the main aspect here is two-fold, to protect the fishing industry and also to deter others from polluting and keep them on the right track to prevent pollution. Well, there may be extenuating circumstances in this pipeline, the breakdown, which is no fault of the Company's, and even a strike. Apart from this strike, there is still half of this 742,000 pounds per day of b.o.d. going into Wainwright Basin, and that is where the seriousness comes in, and I mentioned the 1900 man hours put in by the Department of this matter and Parliament has seen fit to make this a summary conviction and set a fine of, not exceeding, \$5,000.00, for each offence. In addition, You Honour, sub-section 7 of Section 33, which is a new section of the act, the Court may, in addition to any other penalty, impose, or order that a person refrain from committing any further such offence, or to cease to carry on any activity specified in the order the carrying on of which, in the opinion of the Court, will or is likely to result in the committing of any further such offence. Now, the Crown here is not asking for you to make any such order because in the Crown's view, if you ordered this operation to cease, then you would, in fact, be shutting off the mill and adversely affecting the employment of a thousand men in this area. You have the power to refrain from doing such a thing. There has been some discussion with the Company and Department of Fisheries if there should be an order with a time schedule.

Provincial Judge

You are suggesting I have the power to make an order with a time in the future.

Mr. Kier

I think you may have.

Provincial Judge

Have I the power to do that?

Mr. Kier

From committing any further such offence or to cease operation? Strictly speaking, in my submission, I am not too sure, but I think you can say refrain from such and such a date in the future.

Provincial Judge

You are not asking for that.

Mr. Kier

No. I note in Mr. Guimond's statement, paragraph 11 and paragraph 12, paragraph 11 mentions times and schedules, and paragraph 12

mentions tentative arrangements with the Department of Fisheries, tentative only. The Department of Fisheries will in my submission, have considerable authority as to what they feel is satisfactory, and paragraph 12 also states that further treatments will be installed. Now, that is a perfectly, in my submission, proper statement by the Company, and certainly one that is accepted by the Department of Fisheries, indicating to them that reasonable steps will be taken by Columbia Cellulose, and if reasonable steps are not taken, according to what the Department of Fisheries indicate, these will have to be modified as time permits, and circumstances, time stoppages and weather. At the present time, these are going forward and with considerable dispatch at this time, but in the past, not with that considerable dispatch. There was a meeting on July 4th and this labour dispute affected it somewhat. I have seen the outline Mr. Guimond has presented, and I don't quarrel with that. There has not been the fullest co-operation in the past and now it appears to be so and is intended to be so in the future. I don't want to keep harping on this large effluent, but it seems to me that there couldn't have been all that co-operation in the past, otherwise the Company would have seen fit to do something about this b.o.d., rather than wait for the serious fish kill in Wainwright Basin and Porpoise Harbour. Paragraph 16, the Department of Fisheries has said, appears to be a reasonable statement and the Department of Fisheries has the economic good of the country, and that is what is intended here. I am instructed, in speaking to this matter, to ask for the maximum fine, which I have done.

Provincial Judge

The position of the Crown is that they are satisfied with the plans put forward by the Company and that they are genuine.

Mr. Kier

At this point one date here I might say, 1974, that's the only thing I would say at this point is not quite in agreement.

Provincial Judge

Where is that?

Mr. Kier

Paragraph 11 (b), the third line down, completion data 1974. That's the only thing that would have to be worked out. I can't technically say whether these are all satisfactory or not. The outline is tentative and there will be reasonable co-operation. That is satisfactory to the Crown. In spite of that, the Crown is asking, because it is a serious offence, quite a serious offence, and the Crown is asking for the maximum penalty.

Mr. Locke

Just a brief few words. I think my friend is being very fair. I don't agree with everything he says, but after all, the plea of guilty was entered. If the Court will forgive me, evidence was called out of Columbia Cellulose's responsibility to its employees and stock holders

because with the passing of this act by the Minister of Fisheries, one cannot be unaware of the seriousness of this offence, particularly subsection 7, of the consequence that must ensue. I would say something though, my friend asked for a fine of \$5,000.00 to be imposed and he stated the Crown's position quite clearly. I would like to say something about penalty. \$5,000.000 or something like that, the Court will realize it is looking over the tip of an iceberg. The rest of the iceberg is underneath, unable to be seen, and it is five, six million dollars, so a fine at the top end.....Until the last few years, it was not a crime for industries to pollute, society formerly permitted this to be permitted, now it is not going to permit it, which is commendable. When you are in the position of representing older pulp mills, not built with everything, one is playing a game with a whole new world which was not in existence when it was built and now you are asked to spend large amounts of money, capital which is not always available to even large industrial companies as one thinks. This company has never paid dividends yet. Last year it paid three cents a share for, I can't remember how long. The pipeline has been plagued with difficulties. The pipe has broken, arguments have taken place about the various responsibilities of the Company. This may not be of interest to the Fisheries, but it is our problem. Liaison with the Department has, in the past, been pretty good. We met on June 4th and perhaps there has been a hiatus since then, I don't know. The statement we made in paragraph 12, stands. I am glad it was my friend who said the Company is genuine in its statement. I can only say this is so. I ask the Court to take these facts into consideration. We want to co-operate with the Department of Fisheries. We need their co-operation. We have provincial authorities to contend with and know the standards laid down. It is difficult to be too dogmatic in planning, from where I am sitting, as to what the future will hold. I hope the Court will bear these facts in mind and take these facts into consideration. There is so much at stake for a company of this size, considering the magnitude and considering all the people involved and that is why I thought it best to give the Court the fullest report and there is every intention of the company to co-operate with the Department of Fisheries in the future.

Provincial Judge

Thank you Mr. Locke.

Judge Decision (Oral)

I have carefully considered the evidence of Mr. Guimond and the able submissions of the Crown and of the Defence and I am of the opinion that this was a most serious breach of Section 33(2) of the *Fisheries Act*. However, I note that although the offence existed before the recent amendment, the Crown did not bring charges against the defendant, although it alleges that the defendant has been polluting Wainwright Basin for some time. It is evident that the Crown's preferring this charge at this time reflects the current social attitude to pollution and I consider that I should not take

into consideration conditions that have hitherto been tolerated as an evil - from economic necessity.

I therefore fine the defendant \$3000.00.

I make no order under subsection 7 of Section 33 of the *Fisheries Act* taking into consideration the effect of such an order on the operation of the defendant's plant and the consequent effect on local employment, also taking into consideration the negotiations at present being undertaken between the Department of Fisheries and the defendant corporation concerning the elimination of the pollution problem.

REGINA v. KIRBY

British Columbia Provincial Court, Johnson, J., Powell River, B.C. May 8, 1972

Environmental law -- Water pollution -- Gasoline spill -- Permitting the deposit of deleterious substance in water frequented by fish -- Offence one of absolute liability -- Negligence of the accused causing the spill -- Accused found guilty -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(8).

The accused, as district agent for an oil company, was responsible for the management and operation of a tank farm. He was charged with permitting the deposit of a deleterious substance in water frequented by fish after 8400 gallons of gasoline overflowed from a tank which was being filled from a barge.

Held, the accused was found guilty. The offence was one of absolute liability and therefore the Crown was not obliged to prove *mens rea*. The guilt of the accused was founded upon two negligent acts which caused the event in question. These consisted of a mathematical miscalculation of the volume of the tank which overflowed and the failure to monitor the filling operation. The accused's acts had to be assessed under the conditions and circumstances that existed at the time and he could not be exonerated because his employer might have done something to prevent his negligence from causing the offense. If an accused has involved himself through a negligent act then he may be found guilty of the offence.

R. v. Churchill Copper Corporation Ltd., [1971] 4 W.W.R. 481; *The Queen v. Pierce Fisheries Ltd.* (1970), 12 D.L.R. (3d) 591; *R. v. Peconi* (1970), 12 Crim. L.Q. 125; *referred to*.

D.R. Kier, for the Crown

M.R. Giroday, for the Defendant

Johnson, J.:--The accused, whom I shall refer to as 'Kirby' was charged that on the 14th day of December, A.D. 1971, at Lang Bay in the County of Vancouver in the Province of British Columbia, did unlawfully permit the deposit of a deleterious substance, to wit: gasoline in water frequented by fish.

The charge is under the *Fisheries Act* of Canada, Chapter 119, s. 33(2) as re-enacted by 1969-1970 Chapter 63, s. 3(1):

No person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

This re-enacted section of the *Fisheries Act* was assented to June 26, 1970, the previous s. 33(2) read in part 'No person shall cause or knowingly permit to pass into, or put or knowingly permit to be put or any other deleterious substance in any water frequented by fish'.

The facts of the case are that at Lang Bay, a very small community a few miles from the District of Powell River, Gulf Oil of Canada have a small tank farm located near the shore of Malaspina Inlet, part of the British Columbia coastal waters. The tank farm consists of about six oil and gasoline tanks which are filled periodically by means of oil tank barge towed by a tug and located at an adjacent wharf. Hoses from the oil barge are attached to hoses at the wharf which are selectively connected to tanks in the shore tank farm. The barge delivers different oils and gasolines and the products at varying quantities are transferred by pumps on the barge to various tanks which may or may not be inter-connected by valves as the quantity of product are desired.

The total tank farm capacity in all tanks is 180,000 gallons. Surrounding the tank farm is a cement wall, inside the cement wall surrounding the tanks the surface is earth or gravel. Beside the tank farm is a road with a ditch which lead downhill to the sea. The distance from the tank farm to the sea is about 1,300 feet.

Kirby is the Powell River District Gulf Oil Agent. Gulf Oil of Canada constructed and own the tank farm and the products in the tanks. There is no other Gulf Oil representative, employee or agent locally resident and directly connected with the tank farm, except Kirby.

The system of oil and gasoline delivery is that by communication with the Gulf Oil office in Vancouver, Kirby makes arrangements for delivery of products to the tank farm in the quantities as required at the time. The practice is to fill all the tanks on each delivery by the oil barge.

Kirby operates the local oil agency and this tank trucks extract the oil and gas products from the tanks to his trucks for delivery to the various customers or outlets in the Powell River District. Kirby is required to account to Gulf Oil for the products he removes from the tanks. Kirby from time to time dips or measures the tanks to know the amount of product on hand, the amount of which he has taken delivery and to know when a new barge delivery is required.

The method of dipping the tanks is to lower a weighted cord into the tank, then to estimate the level of the product in the tank, remove the measuring cord and apply a substance at the approximate point of the level then lower the cord again, the oil product cuts this substance at a point to give a more accurate measurement of the level of the product in the tank. From this measurement and using a scale chart, the quantity of product required to fill the tank can be estimated quite accurately.

The incident in question occurred during the early morning hours of December 14, 1971. A few days before Kirby says he contacted Gulf Oil for a delivery by the barge. Because of bad weather the tug and barge were delayed, they arrived at Lang Bay about 1:00 am, December 14, 1971. The bad weather had caused heavy snow conditions and the cold weather caused an extra demand on Kirby to delivery fuel by truck to his customers. Kirby says that one of his trucks broke down and there was an extra long work day for him on December 13, 1971 and he did not arrive home for supper until about 10:00 pm.

Kirby says he retired to bed about midnight and was awakened by a phone call from the oil barge at 1:00 am to attend for the delivery to the tank farm. Kirby went

to the tanks for the purpose of measuring, that is gauging, the tanks. The weather conditions were snow to his knees and quite cold. Kirby measured the tanks as described and consulted a chart and made a mathematical calculation as to the amount of product required to fill the tanks. Kirby then went to the barge and talked to Leclair, the barge attendant, and told him that he, Kirby, required 39,000 gallons of diesel and 40,000 gallons of gas regular. Leclair then hooked the barge hoses to the risers and at 2:00 am began to pump for three and one-half hours. While the pumping was in progress Kirby left the barge and went to the tug for a coffee and remained there during the period of pumping.

There is a conflict of evidence as to who has the responsibility in respect to measuring the tanks. Kirby says that the products belong to Gulf Oil and that it is the responsibility of the barge man to measure or gauge the tanks, that at some places there is no agent present to gauge the tanks. He, Kirby, gauged the tanks only for his own information to protect his own interest. Leclair says that sometimes he does gauge the tank, most times with the agent, sometimes the agent alone gauges the tanks. In any event, in this case Kirby was the only one who gauged the tanks and he knew Leclair relied on his figures that the tanks would hold 40,000 gallons of gasoline. Kirby had made a substantial error in gauging the gasoline tank and the result was that the tank overflowed about 8,400 gallons of gasoline. Kirby blames his mathematical error on fatigue and the physical hardships caused by the bad weather. From his explanation and after hearing all of Kirby's evidence, I accept as true Kirby's explanation for the calculation mistake.

There was evidence that a person could not remain on top of the tanks during the filling process because of escaping noxious fumes. There was a small shed or warehouse on the tank farm property, there was no evidence as to why a person could not remain there during the filling. Kirby's evidence was that sometimes while the tanks are being filled he does not remain in the area. Kirby says that he believed that the surrounding cement wall around the tank farm was for the purpose that if any tank should leak or overflow, then the escaping oil or gasoline would be retained within the cement wall. This wall was built through the specifications of Gulf Oil of Canada and engineers of Gulf Oil. I did not have any evidence from Gulf Oil or any engineer that a gravel or earth floor of the tank farm was designed to be capable of retaining 8,400 gallons of gasoline. I would expect that gasoline, as well as water, would seep through the soil and run down hill to the sea.

As the barge pumped the gasoline the tank overflowed, gasoline ran in a small stream, cut a patch under the cement wall, ran to the ditch, cut a path in the snow and ran as a small river of gasoline down the hill past some residences near the beach, then across the top of the sea water. There was a gasoline slick on Lang Bay that morning described by a Fisheries Officer as one-eighth thick, 200 feet out into the Bay.

At about 5:00 am one of the residents was awakened by the smell of gasoline; investigated and raised an alarm, Leclair then shut off the pumps. Neither Leclair or Kirby realized that there was a gasoline overflow at the tank until the resident attracted their attention. The Fire Department was called and a very dangerous situation was controlled without further incident.

There was evidence by one local resident that he had caught fish and seen fish in this water at Lang Bay and I find that on the whole of the evidence that the crown has

proven that the water which the gasoline entered was water frequented by fish. The water was part of the coastal waters of British Columbia, the expression "water frequented by fish" is not restricted to exactly the area covered by the gasoline but the whole of the water of which Lang Bay was a part.

I heard evidence from two technicians of the Department of Fisheries who have conducted bio-assays as to fish and particularly gasoline. As to the whole of the evidence and hearing their opinion I find that the crown has proven that gasoline is a deleterious substance as set out in the charge.

There was no evidence that at the time of the offence that there were in fact any fish in the water covered by the gasoline, and there was no evidence that any fish were or might be expected to be degraded at that time at that place by the gasoline deposited on that water. I find that it is not necessary that the Crown prove that there is or might be any degrading of fish, the Crown need only prove that at some time the water is frequented by fish and that gasoline is a deleterious substance and that the accused did permit the deposit thereof.

The case to be decided is, did the accused permit the deposit of the gasoline and in considering the accused's intent must the Crown prove *mens rea* or is the law an absolute obligation on the accused not to permit the deposit.

In *Regina v. Churchill Copper Corporation Ltd.*, [1971] 4 W.W.R. 481, His Honour Judge Arkell D.C.J., dealt with the same charge as this under the *Fisheries Act*, s. 33(2) as re-enacted and considered the defence of *mens rea* as applied to a charge under this section. Arkell, D.C.J. stated,

Also in *Sweet v. Parsley*, Lord Diplock states at p. 362:

"Where penal provisions are of general application to the conduct or ordinary citizens in the course of their everyday life, the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals, in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose, by penal sanctions, a higher duty of care on those who choose to participate and to place on them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care. But such an inference is not lightly to be drawn, nor is there any room for it unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation (see *Lim Chin Aik v. The Queen*, [1963] A.C. 160 at 174, [1963] 1 All E.R. 223 at 228)."

Parliament, in the 1969-70 amendments to the *Fisheries Act*, obviously adopted the "fair and sensible course" suggested by Lord Pearce in *Sweet v. Parsley* when they enacted s. 38(8).

Also, as stated by Lord Diplock in *Sweet v. Parsley*, the inference is not to be lightly drawn that this is an offence of absolute liability, "unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation". Here the defendant company could "promote the observance of the obligation" imposed by the Fisheries Act by the adoption of direct supervision, inspection and improvement of their operation.

In s. 33(2) of the Fisheries Act there are no such words as "knowingly", "willfully", "with intent" or "without lawful excuse", and I am satisfied that this is an act which, in the public interest, is prohibited under a penalty, and does not add a new crime to the general criminal law, as stated by Ritchie J. at p. 279 in the *Pierce Fisheries* case, with reference to the decision in *Sherras v. De Rutzen*, (1895) 1 Q.B. 918.

I am therefore of the opinion that s. 33(2) of the Fisheries Act is an offence of strict liability, of which mens rea is not an essential ingredient.

Even if I have erred in law and mens rea is an essential ingredient of the offence, I am satisfied that it has been established on the knowledge of the superintendent, a responsible employee of the defendant company.

There is a distinction between the charge under the Fisheries Act, s. 33(2) and the charge as considered in *Regina v. Pierce Fisheries Ltd.* The *Regina v. Pierce* judgment was not considering specifically the words "did unlawfully permit a deposit" and the *Pierce* case was in respect to an offence under the Regulations of the Act and not the Act itself, which had some bearing on the judgment, Ritchie J. says at page 201.

I do not think that a new crime was added to our criminal law by making regulations which prohibit persons from having undersized lobsters in their possession, nor do I think that the stigma of having been convicted of a criminal offence would attach to a person found to have been in breach of these regulations.

In *Regina v. Peconi*, Vol. 13-1, 1970, Criminal Law Quarterly, Stewart, J. dealt with a charge under the Air Pollution Control Act 1967 (Ont.), at page 125 he says:

O. Reg. 449/67 s. 6(2) provides:-

(2) No person shall cause or permit to be caused the emission of any odour to such extent or degree as,

- (a) causes discomfort to persons;
- (b) causes loss of enjoyment of normal use of property; or
- (c) interferes with normal conduct of business.

It was urged upon me that the Crown had not proved mens rea and that this was an integral part of the defence. I gather from Mr. Bagwell that he meant by this that the Crown would have to prove that the accused was aware of the noxious fumes being emitted. In my view it is unnecessary to prove mens rea and that the prohibition set forth in s. 6 is absolute.

It was held in R. v. Sam Consentino Ltd., [1966] 1 C.C.C. 79, [1969] 2 O.R. 623, that mens rea was not an element of the offence of providing an unsafe machine contrary to the provisions of the Construction Safety Act, 1961-62 (Ont.), c. 18. The supplier of the machine was completely unaware of its unsafe condition as it was both supplied and operated by a third party from whom Consentino rented it. R. v. Industrial Tankers Ltd., [1968] 4 C.C.C. 81, [1968] 2 O.R. 142, was a case involving a charge of discharging oil into a creek that might impair the quality of the water, contrary to the provisions of the Ontario Water Resources Commission Act, R.S.O. 1960, c. 281, s. 27(1) (rep. & sub. 1961-62, c. 99, s. 5). The learned county court judge reviewed many cases and came to the conclusion that the Crown need not prove mens rea. R. v. Teperman and Sons Ltd., [1968] 4 C.C.C. 67, [1968] 2 O.R. 174, was a case involving the Construction Safety Act, 1961-62, which was held to be a statute enacted for the protection and safety of a large class of the public and that mens rea was not a necessary ingredient of the offences contravening the relevant provisions of the Act. It was held that such prohibitions did not fall within the proper domain of the criminal law. In Warner v. Metropolitan Police Commissioner (1958), 52 Cr. App. R. 373 at pp. 378-9, Lord Reid quotes with approval the judgement of Wright, J., in Sherras v. De Rutzen, [1895] 1 Q.B. 918, where he said:-

"There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

Then he mentioned two cases and continued:-

"Apart from isolated and extreme cases of this kind, the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of Lush J. in Davies v. Harvey (1874) L.R. 9 Q.B. 433, are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty Another class comprehends some, and perhaps all, public nuisances Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right."

In each of these cases the accused was a Corporation or owner of the plant or operation which was connected with the offence and in each case mens rea was not an essential element to prove a conviction. S. 33(8) of the Fisheries Act must be considered;

In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was

committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

Counsel for the accused has argued that the wrong person was charged, that the accused should be acquitted and that Gulf Oil of Canada, the owner of the tank farm, the barge and the gasoline, should have been charged. In view of the cases in respect to absolute liability under s. 33(2) *Fisheries Act*, and the wording s. 33(8) *Fisheries Act*, the Crown might well have considered such a prosecution, but that is not the case I have to deal with.

In respect to an accused who is not the owner of the plant and is not the owner of the deleterious substance, then before he can be found guilty there must be such involvement by the accused, be it as employee or agent, s. 33(8) *Fisheries Act*, or otherwise, as to come within the meaning of the Act that he did unlawfully permit the deposit. The absolute liability concept as set out in *Regina v. Pierce* cannot apply to every employee or agent, but only to those who did permit the deposit.

Mens rea is not an essential element in respect to a charge against an individual employee or agent, but there must be such involvement to come within the wording of s. 33(8) of the *Fisheries Act*, that the accused may establish his defence, "that he exercised all due diligence to prevent" the commission of the offence. The word permit in the charge need not be permission which is granted with knowledge, but may be permission granted by negligent act and the negligent act may be a malfeasance or a non-feasance. Where the accused is an individual he may be guilty of the charge if he does permit the deposit by doing an act whether intentionally or negligently or not doing an act which would have prevented the deposit if there was a duty imposed on the individual by the standard of the acts of reasonable man under situation. In this case the accused was involved in two negligent acts. The first was that the accused made a mathematical calculation which he conveyed to the barge man knowing that the barge man was relying on these calculations which resulted in the overflow of the tanks. The second negligent act on behalf of the accused was that of a non-feasance in that the accused was the agent for Gulf Oil, he was the only land based representative of the company, the tank farm was under his charge, and there was no other person of authority to observe the tanks during the filling operation. It was reasonable to expect that at some time through an error on the part of the gauging of the tanks or even an error on behalf of the barge man that there might be an excessive amount of gasoline or oil pumped into the tanks, particularly in view of the fact that it was the intent to fill all the tanks on each barge delivery. Therefore, it was the accused's responsibility and duty to keep these tanks under observation and that if there was any overflow to have it stopped as soon as possible in order to prevent danger or damage to the health and welfare of the community and its environment. The adverse weather conditions is not an acceptable defence, the duty is to the public safety and welfare under any conditions.

Considering the *Fisheries Act* and *Air Pollution Act*, (Ont.) this is environmental control legislation which is enacted for the purpose of the protection and control of the environment against acts of any person or persons. In respect to the owners and operators of plants and installations, then there is a very heavy onus on these persons to establish their plants and construct their equipment in such a way as there shall not be any unlawful damage to the environment. The law imposes an absolute liability on these persons and no excuse is acceptable as a defence. In *Regina v. Pierce*, the

offence occurred without the knowledge or permission and against the specific instructions of the company, and there was no evidence of any negligent act on behalf of any employees or agents of the company, and still the company was found guilty of the offence. In this case, Counsel for the defence argues that the damaged environment was caused by the Gulf Oil of Canada not properly installing the cement wall around the tank farm and if it had been done properly, then the gasoline would have been retained and, of course, not deposited on the water frequented by fish. Gulf Oil may well have installed some valves or controls on the tanks to prevent the overflow of the tank. They could have constructed a cement floor inside the walls of the tank farm which might have prevented the gasoline flowing to the sea. Because Gulf Oil did not do these acts and might be guilty of an offence under the Act does not exonerate the accused if, in fact, he has done any negligent act which has resulted in the deposit of the deleterious substance in the water frequented by fish. The accused's acts are assessed under the conditions and circumstances as existed at the time and he should not be exonerated because his employer might have done something to prevent his negligence from causing the offence. If the accused is involved by a negligent act then he may be found guilty of the offence. I find that the accused's actions on the night in question were such negligent acts as to permit the deposit of a deleterious substance in waters frequented by fish within the meaning of s. 33(2) of the *Fisheries Act*, and I find the accused guilty.

Johnson, J.:--(Sentence) In considering the sentence in this matter the *Fisheries Act* provides a maximum sentence under this charge of \$5,000. In *Regina v. Churchill Copper Corporation Limited*, His Honour, Judge Arkell said: "To serve as a protection to society, and also as a deterrent, a fine of \$5,000. has been imposed, in addition to an order being made pursuant to s. 33(7) that Churchill Copper Corporation Limited refrain from depositing or permitting the deposit of any deleterious substance in the Racing River." The only other case I found, which had to deal with sentencing under pollution control legislation is *Regina v. Industrial Tankers Limited*, Canadian Criminal Cases 1968, Volume 4, page 81, and His Honour, Judge Spragg of the County Court of Ontario dealt with the case under the *Ontario Water Resources Commission Act*. In that case a workman was cleaning a tanker truck and allowed an oil spill of approximately ten gallons into Morrison Creek. It appears that part of the ten gallons entered the creek and polluted the creek. The sentence in that case was the sum of three hundred dollars fine. I haven't found any cases which again deal with this problem, of the fine imposed on an individual rather than as to the corporation or owner of the plant which, for example, in *Churchill Copper's* case was presumably, a corporation of a great deal of wealth, the amount of money of \$5,000. is a relatively small fine in comparison to their substantial wealth. I must relate this matter back to an individual. I have no evidence as to what Mr. Kirby's wealth is, other than his description of his occupation and his position, which I heard during the trial. I also have to take into consideration that this is a major spill, in that we are dealing with a quantity of 8,400 gallons of gasoline. We have no accurate information of what amount actually entered the water. But the evidence is that it is substantial. I do not have any evidence that it actually did any damage. From evidence I have heard that the potential of damage was also substantial. I must also take into consideration the matters pertaining to how this occurred in respect to Mr. Kirby and that it was Mr. Kirby's fault in making a mis-calculation in gauging the tank at a time when he was under extreme fatigue and under very adverse weather conditions. There were conditions which were not normal and the human body can, at times, stand only so much and there could be errors because of these conditions. I find that one of the

major faults that Mr. Kirby had made is that he was the only representative of Gulf Oil who was attached to this tank farm, was the only land-based personnel, the tank farm was his responsibility whether he owned it or not. It was his responsibility to see that the spill did not occur and that either he, or someone else, kept such observation on the tank farm that such spill would be prevented. This is whether he felt that he should, or should not have. I think that the standard and duty of care is such that he should have recognized that the tank farm should be kept under observation during a period of time when the tanks were being filled, because there might have been an error on his part, or an error on the part of the bargeman, or someone else, or that there may have been a mechanical failure. But again, it was at a time when the weather conditions were so adverse that it was difficult for anyone to keep a three to four hour watch on those tanks under those conditions. So, taking all these matters into consideration, I find that this is not an appropriate case for giving a maximum sentence, as set out in *Regina v. Churchill Copper*. So then what amount out of the total of \$5,000. should be applied as a fine in this case. I find that a fine of \$1,000. would be appropriate in this case and I so fine you \$1,000. In default three months in gaol.

KIRBY v. THE QUEEN

British Columbia Supreme Court, Swencisky, J., November 22, 1972, Powell River, B.C.

Environmental law -- Water pollution -- Gasoline spill -- Permitting deposit of deleterious substance in water frequented by fish -- Appeal from conviction -- Appeal dismissed -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2).

Swencisky, J.:--Gulf Oil is not before the Court as an accused person, so I express no opinion as to whether or not it would be liable to prosecution under the *Fisheries Act*. The charge with which the Court is dealing is a charge against the accused, Kirby. His appeal is solely regarding conviction and not against sentence. I hold that *mens rea* is not an element that the Crown is called upon to prove beyond a reasonable doubt, and I hold that the prohibition contained in the *Fisheries Act*, in the Section concerned, is absolute. I find that the error made by Kirby was the actual cause of the spillage. I find the accused guilty as charged. The appeal is dismissed without costs.

REGINA v. CONNOR FARMS LTD.

British Columbia County Court, Stewart, C.C.J., June 20, 1972

Environmental law -- Fisheries -- Destruction of fry caused by failure to maintain adequate flow of water in creek -- Accused convicted -- Fisheries Act, R.S.C. 1970, c. F-14, s. 30.

Constitutional law -- Applicability of federal fishery protection legislation to fry rearing areas -- Authorization to use water under provincial legislation not a defence - - British North America Act, 1867, s. 91(12); Fisheries Act, R.S.C. 1970, c. F-14, s. 30; Water Act, R.S.B.C. 1960, c. 405.

The accused corporation drew water from an impoundment created by a dam across a small stream which flowed through its property. Although warned to maintain a continuous flow in the creek, the company nonetheless occasionally caused the flow to be cut off entirely, and salmon fry perished as a result. An information charging the company under s. 30 of the *Fisheries Act* was dismissed in Provincial Court, and the Attorney-General of Canada appealed.

Held, the appeal should be allowed and the accused convicted. The evidence established that the actions of the company caused the death of the fry. S. 30 was a valid exercise of the exclusive federal power over sea coast and inland fisheries which would be severely limited if fry rearing areas such as the stream in question were not protected. Authorization to construct and operate the dam under provincial water rights legislation did not relieve the accused of liability under the federal statute.

R. v. McTaggart (1972), 6 C.C.C. (2d) 258; *R. v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5; *referred to*.

J.A. McLennan, for the Crown, appellant
H.M. Suiker, for the accused, respondent

Stewart, C.C.J.:--This is an appeal by the Attorney General of Canada from an order of the Provincial Court dismissing an Information that the respondent destroyed fry of fish contrary to Section 30 of the *Fisheries Act*, R.S.C. 1970, c. F-14:

30. The eggs or fry of fish on the spawning grounds, shall not at any time be destroyed.

This is the general background. The respondent operates a substantial agricultural undertaking in connection with which it uses quantities of water some of which, at least, it obtains from a stream running through its property. The water is stored by means of a dam and pumped as required. This operation is authorized by Provincial authorities under the *Water Act*, R.S.B.C. 1960, Chapter 405.

The alleged violation of Section 30 took place according to the Information, between the 16th and 28th of August, 1970 but an amendment was granted at this hearing with no objection from the respondent, changing these dates to the 10th and 29th of August, 1970.

The only reasonable explanation of the evidence establishes satisfactorily these additional facts. Salmon spawn above and below the dam in question. Fry existed in the area at material times. The flow of the creek below the dam was dangerously low at times during the summer of 1970. The respondent was warned and became fully aware, if it had not known before, that a continuous flow of water was required for the preservation of fry. After the warnings there were occasions when the flow of water was entirely cut off leaving isolated pools on the creekbed some of which became incapable of supporting fry as the oxygen was used. The fry perished at material times as a direct result of the failure of the respondent to permit a flow of water through the dam. I can draw no other conclusion but that the respondent took no reasonable step to permit a flow of water in keeping with the creek's capacity, and that it had no reasonable belief that water flowed continuously. Few dead fry were found below the dam and it clearly was not conclusively established that fry would not die even if the stream had not been obstructed by the dam. Yet I have no reasonable doubt that fry were destroyed as alleged.

That disposes of the defence that there must be a reasonable doubt on this essential ingredient of the violation. It also disposes of the defence that there was no evidence of *mens rea* for, in my opinion, the foregoing facts establish that element having regard to the nature of the violation involved, which is not a truly criminal offence. If I am wrong the respondent is still faced with the decision in *Regina v. McTaggart* (1972) 6 C.C.C. (2d) 258 where the principle laid down in *Regina v. Pierce Fisheries Ltd.* (1971) S.C.R. 5 was applied to Section 30 of the *Fisheries Act*. I do not consider it necessary to consider these authorities further.

This brings me to the third defence raised by the respondent. If I understand that defence correctly it substantially depends on the proposition that the scope of Section 30 does not extend to the area of the dam. It is argued that this area cannot be called a fishery and comes within no definition of that word and particularly the definition in the *Fisheries Act*, although that admittedly is not all inclusive. Counsel for the respondent questioned whether the scope of the section was ever intended to extend to non-tidal, non-navigable streams such as the stream in this case. Further, it was said, the *British North America Act* applies only to public fisheries which cannot be said to include this stream.

The appellant contends that any reasonable meaning of the word "fishery" would include the area here in question and that in any case the authorities are clear that Parliament has the exclusive jurisdiction to legislate for the protection and preservation of the fishing industry generally, and any interference with private proprietary rights is immaterial.

Something was made of the fact that the respondent's diversion of water from the stream was specifically authorized under the *Water Act of British Columbia*. I do not think that this relieves the respondent of any obligation he may have under Section 30 of the *Fisheries Act*.

So it seems to me that the point to be decided is whether Section 30 encompasses the area of this dam. I see some merit in the respondent's submission that the area in question is not a fishery. But that does not help the respondent's case because in my opinion matters dealt with in Section 30 are matters within that class of subject designated in Section 91 of the *British North America Act* as "Sea Coast and

Inland Fisheries". The prohibition of the destruction of fry contained in Section 30 is as vital as any legislative measure toward the preservation of fisheries generally. If Parliament did not have the right to legislate for the preservation of fish at their source the stream in question being one such source, the power granted to it over fisheries generally by the *British North America Act* would be seriously diminished and no argument on behalf of the appellant has persuaded me that this was ever intended or that it is indeed the case.

It follows that I must allow the appeal and find the respondent guilty of the violation charged.

There remains only the matter of penalty which subject to submissions by counsel, I think should be nominal in nature. However, I am prepared to deal with this after hearing any submissions which counsel choose to make.

REGINA v. NORGAARD READY MIX LIMITED

British Columbia Provincial Court, Van Male, J., Merritt, B.C., July 12, 1973

Environmental law -- Water pollution -- Sentence -- Deposit of deleterious substance in water frequented by fish -- Remedial measures taken by accused and cooperation with authorities mitigating sentence -- Fine of one thousand dollars -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

*Peter Jensen, for the Crown
Glen Henderson, for the Accused*

Van Male, J. (Orally):--Thank you. I do not think there is any need for me to reserve or take any time with this plea of guilty. I might comment that society of late is very aware of the destruction of our environment and our resources. In England where you have a great many more people crowded into a smaller area they have seen fit to pass very, very severe legislation and if this case were being heard in England and it was a case of, of a gaol sentence, they have legislation which makes the president of the company liable for gaol which is something we do not have. We deal with it here at this juncture and at this time by way of fines.

Since the time Columbus arrived in America until the present time we and our ancestors have felt that there was an inexhaustive supply of water, timber and energy and minerals and we now know that is not true and it may even be too late to reverse the destruction of the environment, and because of this feeling that is why the *Fisheries Act* and various other Acts have been brought into being and they will become more and more demanding and legislation will be imposing larger penalties for the destruction of any of our resources. We have had a great number of environmental groups that have sprung up. There is PROP and SPEC, indeed the Federal Government Environment of Canada, all clamouring for and demanding that our resources be protected. We have here Norgaard Ready Mix dumping water into the Nicola River which the Crown alleges is a spawning bed for fish and the penalty section of the Act, I believe, goes to some \$5,000.00 a day.

Under different circumstances this Court would not hesitate to impose a fine of \$5,000.00, but on Mr. Norgaard's part he says that he has, and the Crown admits, that he has cleaned up the operation and that he is endeavouring to obtain more land for a larger settling pond. I think while I may not be legally entitled to, I can take some judicial notice of the size of Norgaard Ready Mix as it relates to Kamloops Pulp and Paper and the Co-op and K.P. Wood Products and I do not propose to fine Mr. Norgaard or Norgaard Ready Mix on the same scale that I would fine a larger and bigger company.

I can take notice of the fact that the Crown has withdrawn a number of charges and I take it that is because they feel they are getting the required co-operation from Mr. Norgaard and taking that into consideration I am going to fine him, Norgaard Ready Mix Ltd., \$1,000.00 for the offence which occurred on the 29th day of November, 1972.

REGINA v. ELF OIL EXPLORATION AND PRODUCTION CANADA LTD.

Northwest Territories Magistrate's Court, Parker, Ch. Mag., Yellowknife, April 30, 1974

Environmental law -- Water Pollution -- Oil Spill -- Deposit of deleterious substance in place where may enter water frequented by fish -- Failure to provide adequate containment facilities for oil -- Absence of continuous surveillance -- Due diligence not shown -- Accused convicted -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(8).

The accused was charged with permitting the deposit of oil in a place where it did enter water frequented by fish after diesel oil flowed from a ruptured fuel bladder and entered a nearby watercourse.

Held, the accused was convicted. No fuel should have been brought to the site until adequate precautions were taken to ensure its security. At the least, continuous surveillance of the fuel bladder was required under the circumstances. The conduct of the accused did not demonstrate due diligence under the conditions prevailing.

Orval J.T. Troy, Q.C., for the Crown.
David H. Searle, Q.C., for the Accused.

Parker, Mag.:--Well, this is a charge laid on behalf of Her Majesty the Queen by Hugh Robert Trudeau, a Fisheries Officer of the Northwest Territories, hereafter called the Informant, who says he has reasonable and probable grounds to believe and does believe that Elf Oil Exploration and Production Canada Ltd., on or about the 5th day of September, 1973, at or near Kugaluk River, approximate location 69 degrees 12 minutes north latitude by 130 degrees 57 minutes west longitude in the Northwest Territories, did unlawfully permit the deposit of a deleterious substance at a place where it did enter water frequented by fish, contrary to Section 33(2) of the Fisheries Act. And I suppose I should read that Section, sub-section (2), "subject to sub-section (4), no person shall deposit or permit the deposit of a deleterious substance in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance, may enter any such water." And there was a statement of facts, agreed facts, filed, and I must say it was very helpful to me since it narrowed the issue down considerably. In fact, I think I am possibly not over-simplifying to say that it was admitted that the essentials of the charge were conceded subject to sub-section (8) of Section 33, which provides relief, I would suppose I should say, which I shall read as follows: "In prosecutions for an offence under this Section or Section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the Accused, whether or not the employee or employer has been prosecuted for the offence, unless the Accused establishes that it was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission." As I say, the evidence which was presented today was really limited to that last provision respecting the exemption, I suppose, of an Accused where "the Accused establishes it was committed without his knowledge and consent and that he exercised all due diligence to prevent its commission."

There were numerous photographs submitted by both the Crown and the Defence which were of great assistance to the Court, and we had very detailed technical evidence from witnesses, and particularly on the technical side from the Defence witnesses, and I must say I felt they gave their evidence in a very straightforward manner, and even I, as a layman, I think I could understand what they were getting at. The problem was, of course, that this diesel fuel which was in this bladder did, in fact, escape from this bladder, I think it was bladder No. 2, and made its way down to the surface of the adjacent water. This is the essential. You could see that this diesel fuel did percolate down in that manner; and also it is pretty clear how this happened. It was due to a break in the bladder which contained the diesel. There was considerable evidence on the particular location of this break. Apparently it was adjacent to a difficult one to repair, and indeed it appears that the weight of the valve itself contributed to the failure of this particular bladder at that point. I noticed that when Counsel were demonstrating this valve and showing it to the Court, that it did seem to be a very heavy item. I can quite see that it would put a strain on the material adjacent to it. Another thing, of course, the ground conditions at this site were extremely difficult. As was given in the evidence, it was a boggy, quagmire type of situation, and this made it very difficult to provide the proper dyke or berm, as it was called, around the area where the bladders, and this particular bladder, was installed. There was, in fact, no adequate dyke or berm around the bladder such as was required. Another situation which contributed somewhat was this leaky liner. The bonding cement which had been used, didn't act. We are not told why it wouldn't act. I know that some of these bonding cements have to be used in a warm temperature. Whether this was the case, I don't know. At any rate, it didn't hold, so you had a combination of various rather unfortunate circumstances. I suppose first really was the lack of a proper berm or dyke, and then there is the problem of the liner not being in one piece and not bonding properly, and then you have the bladder, though it had been repaired twice, finally failing again, and the combination of these circumstances led to this fuel escaping. The other point, which wasn't stressed but which occur to me, was that while there was a visit made to the site, I think on the 31st of August, there was not any type of continuous supervision or observation of this site. It seems to me there was a rather unsatisfactory situation there, and a possibility of trouble, more than a possibility. As I say, with this particular liner, the bladder had leaked twice; you had the condition of the poor liner; you had the condition of the lack of a berm; these three things, and nobody on the site. If there had been somebody on the site, with a walkie-talkie or something of that sort, possibly they could have done something or possibly move the valve as was done in September and at least controlled the spill to a certain extent. So, in my view, in these conditions, and it is easy to criticise, of course, after the event, the oil should not have been brought onto the property in the first place until such time as conditions were right to contain it. And, secondly, in my view, in this situation, you actually take a chance, really, in going against the regulations and the practice of taking the oil onto the property; and I feel you have to maintain continuous supervision if you are going to try to get away with it.

So, in the result, I can't find that the Company exercised due diligence to prevent the pollution. As was brought out, after the event, every effort was made and so on, but this is something else. In the result, I find this charge proved.

The penalties specified in this are a maximum of \$5,000 (five thousand dollars). Actually, with the large expenditures and the potential serious results of infractions of this type, I believe the maximum penalty is really quite low. But, nevertheless, that is

the maximum, and I would only impose the maximum if it were a more flagrant case than this. Certainly these people although in my view they made a poor decision in getting in there, have co-operated, and I was impressed by the way they gave their evidence, and I felt that the witnesses for the company were very fair. So, I will impose a fine of \$2,000 (two thousand dollars).

REGINA v. CYPRUS ANVIL MINING CORPORATION LIMITED

Yukon Territory Magistrate's Court, O'Connor Mag., Whitehorse, November 5, 1975

Environmental law -- Water pollution -- Sentence -- Failure of tailings pond -- Permitting deposit of deleterious substance in place where may enter water frequented by fish -- Maximum fine of five thousand dollars -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

Failure of the dyke surrounding the tailings pond at the accused's mining and milling operation resulted in the deposit of approximately one million gallons of effluent into a nearby creek. The accused plead guilty to a charge under s. 33(2) of the *Fisheries Act*, but argued that approval of the dyke by government inspectors should mitigate the sentence.

Held, the maximum fine of five thousand dollars was imposed. The primary responsibility for the construction, maintenance and integrity of the structure in question lay with the accused, and neither the legislation nor the conduct of the government inspectors could diminish that responsibility. Having regard to the seriousness of the offence, the need to deter this accused and others engaged in the same activities, and the wealth and size of the company, the objectives of sentencing could only be met by imposition of the maximum fine.

P.J. McIntyre, for the Crown.

E.H. Nielsen, for the Accused.

O'Connor, Mag. (Orally):--This is the judgment with respect to the matter of sentencing of the Cyprus Anvil Mining Corporation. The facts surrounding the spill from the tailings pond have been fully set out by counsel and I am not going to repeat those facts in the judgment. However, a number of points have been raised by counsel during the course of their submissions which deserve comment.

Mr. Nielsen has made much of the fact that the government, pursuant to various pieces of legislation, had approved the plans for the erection of the five foot lift to increase the capacity of the upper tailings pond, and also of the fact that the government inspectors, under the legislation, were entitled to inspect the work that was carried out, as they saw fit. He points out that prior to the washout occurring on March 19th, no complaint was made by the government inspectors concerning this work. That, of course, is true. However, in my view, the primary responsibility for the proper design, construction, inspection and maintenance of the retaining wall rested with the defendant company. Nothing in the legislation, nor the fact that the government inspectors did not register any complaint concerning any weakness or fault in the retaining wall, diminishes the company's responsibility to ensure that it accomplished the purpose for which it was erected.

The Crown suggests that the washout occurred for one or more of four reasons, which, in the circumstances, seems to me to be a logical suggestion. In any event, whatever the cause of the original washout, it is obvious that the wall or dike as constructed by the defendant company, was not capable of performing the task for which it was erected. I must assume that the defendant company was aware that

should a break or washout occur in the dikes or the walls surrounding its tailings pond, the quantity of deleterious substance to escape into the nearby waterways would be substantial. The importance of properly constructing walls in the first instance, therefore, cannot be minimized.

I wish to comment as well on the suggestion that on March 20th, the representatives of the Fisheries Department, the Environmental Protection Services and of the Department of the Environment, who were on the scene, did not make any suggestions, or take any steps which resulted in a stoppage or a reduction of the quantity of effluent being discharged from the ponds. That again may be true but, in my view, the primary responsibility to repair the damaged wall rested with the company. It had been granted a licence to construct the tailings ponds, and none of the powers vested in government officials to approve, to inspect, to suggest or to order changes, reduces, or ought to reduce the company's responsibilities.

This is not a case of the company releasing a deleterious substance with greater than permitted toxic level on an isolated occasion. In other words, it is not a case of not properly controlling the amount of toxicity released into the waterways. This involves the release of an enormous quantity. I accept that in reacting to the crisis the company acted in the very best of faith and tried to bring the situation under control as quickly as possible. This is an offence of strict liability and as I have said, the company is required to bear the responsibility for the consequences that resulted from the original washout. The consequences that occurred, in my view, were foreseeable if a break or a washout did occur.

It is suggested that the amount of profit, or the size of the operation of the defendant company should not be considerations with respect to the quantum of fine. Certainly they are not relevant with respect to the defendant company's obligation to be careful. All citizens, corporate and otherwise, rich and poor, have an equal obligation in this respect. However, in determining what fine, if any, would best ensure that the defendant would not permit a repeat occurrence, it seems to me that the size of its operation and its wealth are relevant considerations. I agree that the maximum fine, \$5,000.00, when compared to the size of the company's operation, seems hardly adequate to induce the company to do something that it is not otherwise motivated to do. But that is not a valid reason for not imposing a fine in that amount.

I must consider as well the deterrence of other companies who are licenced to construct and to maintain tailings ponds in the course of their business. As I have said, breaks in the walls surrounding tailings ponds can result in a very substantial escape of deleterious substances into waterways and in most instances very substantial damage. The fine here ought to point out the serious view that the court will take of any such occurrence. I am satisfied that in this case, for the reasons I have outlined above, that the objectives of sentencing can best be achieved by the imposition of the maximum fine. In so doing I do not feel that to impose the maximum fine with respect to a spillage of this size, and to impose that fine on this defendant, can be described as being either harsh or unfair. The defendant company will be fined in the amount of \$5,000.00 in default distress.

CYPRUS ANVIL MINING CORPORATION LIMITED v. THE QUEEN

Yukon Territory Supreme Court, Maddison, J., Whitehorse, March 26, 1976

Environmental law -- Water pollution -- Appeal from sentence -- Not "worst case category" -- Maximum fine reduced -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5); Criminal Code, s. 755(3).

The accused appealed from the maximum fine of five thousand dollars imposed after conviction on one count of permitting the deposit of a deleterious substance in a place under conditions where it may enter water frequented by fish, contrary to s. 33(2) of the *Fisheries Act*.

Held, the appeal was reduced to four thousand five hundred dollars. While the guilty plea in this case was not a factor which could mitigate sentence, this incident nonetheless did not fall within the "worst case category". The offence occurred because of an error in judgment and was neither deliberate nor negligent, the company made repairs promptly, and the company cooperated with the authorities as a good corporate citizen.

Canada Tungsten Mining Corporation Ltd. v. The Queen, unreported, N.W.T.S.C., March 5, 1976; *R. v. de Haan*, [1967] 3 All E.R. 618; *R. v. Johnston*, [1970] 4 C.C.C. 54; *R. v. Spiller*, [1969] 4 C.C.C. 211; *refd to*.

P.J. McIntyre, for the Crown, Respondent.

E.H. Nielsen, Q.C., for the Accused, Appellant.

Maddison, J.A. (Oral):--The appellant pleaded guilty in Magistrate' Court to the charge that it:

did, between the 19th and the 21st day of March, A.D. 1975, unlawfully permit the deposit of a deleterious substance in a place and under conditions where such deleterious substance may enter waters frequented by fish contrary to Section 33 of the Fisheries Act.,

and the Magistrate sentenced the appellant to pay the maximum fine provided by the *Fisheries Act* for that offence: the sum of \$5,000.00.

On this sentence appeal brought by the appellant which lasted two days, I heard a statement of the facts with many exhibits tendered by the Crown; evidence tendered by the Crown and evidence tendered by the Defence.

On this appeal, by virtue of the provisions of Section 755 subsection (3) of the Criminal Code (which reads as follows):

Where an appeal is taken against sentence, the appeal court shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or receive, by order (a) dismiss the appeal, or (b) vary the sentence

within the limits prescribed by law for the offence of which the defendant was convicted.

I must consider the fitness of the sentence imposed.

Like the Magistrate, I do not need to come to any conclusion as to the cause of the failure of the dike. In this kind of situation where the matter is one of strict liability, the fact is that the dike proved to be inadequate for the purpose intended, and as a result, quantities of tailings water (somewhere between 70,000,000 gallons and 150,000,000 gallons) were deposited into Rose Creek. What part of that tailings water was toxic is open to question, but there is no question that the quantity of deleterious substance was very substantial.

The Magistrate in my opinion made no error in sentencing in referring to the wealth and size of the appellant in a case such as this. In the case of *Canada Tungsten Mining Corporation Ltd. v. Her Majesty the Queen* in the Supreme Court of the Northwest Territories (a case which is as yet unreported dated March 5th, 1976), Mr. Justice Morrow said this:

The magnitude and impersonal nature of present day industrial mining and similar operations makes it doubly important that the penalty not be so small as to invite breaches, as to make it worthwhile to gamble on not being detected. Regina v. Kenaston Drilling (Arctic) Ltd. (1973), 12 C.C.C. (2d) 383.

This case comes (subject to what I have to add in a moment), because of the large quantity involved, into the category of what one may call "the worst case category". But Mr. Nielsen, counsel for the appellant, says that I must consider the mitigating circumstance of the guilty plea and the benefit to the community derived from saving the cost of taking the appellant company through a long trial to prove guilt. And in support of this contention he cites *Regina v. de Haan*, 1967 3 All E.R. 618, in the English Court of Appeal, which is relied upon by the Ontario Court of Appeal in *Regina v. Johnston*, [1970] 4 C.C.C., page 64.

I am not bound by *Johnston* or *de Haan*, and indeed I prefer to follow Mr. Justice Robertson in the Court of Appeal of British Columbia in a decision slightly earlier than the *Johnston* decision (a decision given on March 17th, 1969 - the *Johnston* decision was March 31st, 1970) reported in [1969] 4 C.C.C., page 211: the case of *Regina v. Spiller*. Mr. Justice Robertson says this at page 214:

Counsel cited R. v. de Haan, [1967] 3 All E.R. 618 at p. 619, (C.A.). There Edmund Davies, L.J., said: 'It is undoubtedly right that a confession of guilt should tell in favour of an accused person, for that is clearly in the public interest.'

Mr. Justice Robertson goes on to say:

With the greatest respect, I do not think that that is a principle of universal application, though it may well be appropriate to apply it in some cases, and I do not think that any significant weight should be given to a plea of guilty here: the respondent knew that she was inescapably caught.

I agree with what Mr. Justice Robertson says. That is the case here. The appellant knew that it was inescapably caught by this *Fisheries Act*, "Pierce Fisheries" type of strict liability legislation. The guilty plea in these circumstances is not a mitigating factor.

Mr. Nielsen says, however, that I must consider as well the mitigating circumstances that the act was not deliberate or indeed even as a result of negligence, but as a result of an error in judgment; that there is no suggestion that the company's attitude was anything but cooperative; that the company responded promptly (Mr. Nielsen used the term "with alacrity") to make the necessary repairs as soon as the spillage was discovered; and that all of these three items, plus the protestations of good corporate citizenship from those two representatives of the company who gave evidence before me, along with their evidence of what they did, must lead me to take the case out of the "worst case category" and therefore reduce the maximum fine.

I am inclined to agree with that, and had it not been for the fact that the appellant re-commenced the mill and continued the mill running when there continued to be substantial leakage, I might have reduced the fine from the maximum to, say \$2,500.00.

I am of the opinion that although the quantity comes into the "worst case category", there are other matters which one can envisage which can make the situation worse, such as: deliberateness, recklessness, a cavalier disregard for the Regulations and the instructions of the various environmental authorities. The maximum penalty must be reserved for those cases.

In considering the fitness of the sentence, I feel impelled to take this case out of that category by reducing the fine to \$4,500.00, and I do so.

I wish to thank counsel for the excellence of their presentation.

REGINA v. DAN FOWLER

British Columbia Provincial Court, Johnson, Prov. J. April 23, 1976

Constitutional law -- Accused carrying on logging operation -- Charge under the Fisheries Act, R.S.C. 1970, c. F-14, s. 33(3), that while engaged in logging accused put debris into water frequented by fish -- Section ultra vires Parliament.

Section 33(3) of the Fisheries Act, which provides: "No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water", is ultra vires the Parliament of Canada; the section is not certain and effectual and cannot be relied on where it clearly controls logging operations and leaves untouched other operations which also involve putting debris into water.

Interprovincial Co-operatives Ltd. and Dryden Chemicals Ltd. v. The Queen in Right of Man., [1975] 5 W.W.R. 382, [1976] 1 S.C.R. 477, 53 D.L.R. 321 referred to.

Regina v. Robertson (1882), 6 S.C.R. 52; *Re B.C. Packers Ltd. and B.C. Council United Fishermen & Allied Workers' Union*, [1974] 2 F.C. 913, 50 D.L.R. (3d) 602, affirmed [1976] 1 F.C. 375, 64 D.L.R. (3d) 522 (C.A.) applied.

Note up with 4 C.E.D. (West. 2nd) *Constitutional Law*, s. 41.

(Headnote from 1976 6 W.W.R. 28)

R. Gibbs, for Accused
B. Buan, for the Crown

Johnson, Prov. J.:--The accused is charged with two counts under s. 33 (3) of the *Fisheries Act* R.S.C. 1970, c. F-14, as follows:

That Dan Fowler, from April 27, 1975 to May 27, 1975, while engaged in logging, did UNLAWFULLY put debris into water frequented by fish, to wit: at or near Forbes Bay, in the County of Vancouver, Province of British Columbia, CONTRARY TO THE PROVISIONS OF SECTION 33 OF THE FISHERIES ACT, as amended;

That Dan Fowler, from April 27, 1975 to May 27, 1975, while engaged in logging, did UNLAWFULLY knowingly permit to be put, debris into water frequented by fish, to wit: at or near Forbes Bay, in the County of Vancouver, Province of British Columbia, CONTRARY TO THE PROVISIONS OF THE SECTION 33 OF THE FISHERIES ACT, as amended,

On completion of the trial it is conceded that all the ingredients of count 1 had been proven by the Crown and if the accused is guilty he would be guilty of count 1 and the Crown would withdraw count 2. The sole defence in this matter is that s. 33(3) of the *Fisheries Act* is ultra vires the Parliament of Canada.

The Attorney General for Canada and the Attorney General for British Columbia have been properly served under The *Constitutional Questions Determination Act*, R.S.B.C. 1960, c. 72. The Attorney General for Canada was represented by Crown counsel, no one appearing for the Attorney General of the Province of British Columbia. Service of the proper notice was acknowledged by the filing of the letter from the Attorney General's Department of British Columbia.

The facts of the case are that the accused, Dan Fowler, was carrying on a logging operation at a place known as Forbes Bay on the east shore of Humphrey Channel in the County of Vancouver, Province of British Columbia. Dan Fowler was subcontracting the removal of logs and timber from this land for the purpose of the logs being towed away. The evidence indicated that Dan Fowler was carrying on a normal and usual logging operation. As part of the logging operation the logs were removed from the forest by dragging the logs with a caterpillar tractor and in the course of dragging these logs they were dragged across a small stream, which is so small that it has no name. There was no exact measurement of the width of the stream but a photograph would indicate it is a few feet wide. From this logging operation there was debris deposited in the stream bed. From the photograph tendered as an exhibit and from the description given in evidence the debris consisted of limbs, branches or tops of trees.

This stream flowed into Forbes Bay which is salt water, part of the coastal water of British Columbia. The stream at some times contained fish; the fishery officer said that the stream was used for the spawning of two species of salmon, coho and pink, and for the rearing of the coho fry.

There was no evidence tendered by the Crown that the deposit of the debris affected or injured the fish or the fry in any way. On cross-examination the fishery officer said that this type of debris deposited in the stream could be a deleterious substance affecting the biological oxygen demand in the stream and that the fish eggs and the fry had a high oxygen demand. The fishery officer; on cross-examination, said that the debris could affect the number of fry by damaging the eggs in the gravel spawning ground. The fishery officer further said that every time something is done to the stream it may have a far-reaching effect or little effect.

The defence's argument that the part of the *Fisheries Act* under which the accused is charged is *ultra vires* in that this section does not provide for the protection and preservation of fisheries which is within jurisdiction of the Parliament of Canada under s. 91(12) of the *B. N. A. Act*, 1867, but that s. 33(3) of the *Fisheries Act* controls logging, lumbering and land clearing which is within the jurisdiction of the Legislature of the Province of British Columbia under s. 92(13) of the *B. N. A. Act*, and the right of the province to concern itself with the sale of public lands belonging to the province and of the timber and woods thereon under s. 92(5) of the *B. N. A. Act*.

To applicable section of the *Fisheries Act* is follows: (s. 33(3)):

(3) No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.

First the *Fisheries Act* in general, but specifically s. 33(3), will be examined in detail. This section applies only to those persons engaged in lumbering, logging and land clearing. It is significant from this point of view that if persons not so engaged, mining for example, should put debris into water frequented by fish this section would not apply. This section applies only to slash, stumps or other debris. In applying the *ejusdem generis* rule, the debris is material similar to slash and stumps such as leaves, limbs and parts of forest vegetation. In this particular case, the accused is charged only with putting the debris into water frequented by fish. Webster's New Collegiate Dictionary, 1975, has the following definition: "debris" - "the remains of something broken down or destroyed". Therefore, in interpreting this section the word "debris" would refer to that material broken down or destroyed during the logging operation which would include the limbs and branches from the logs or trees being removed from the forest and in particular those limbs or branches which were deposited in the stream. The debris would include any part of a tree besides the branches; it could include the leaves of the trees, cones and needles and the bark, no matter how small. Size or quantity would not be a criteria.

The words "slash, stumps or other debris" do not include the logs or trees themselves, "the slash" being that portion that is cut or moved from the tree, "the stumps" being that portion which is the root of the tree and "the debris" being those portions which are broken or otherwise removed from the tree. Section 33 (3) does not prevent the putting of the log acquired during the logging operations into the water frequented by fish. Therefore it was not an offence to take the log through the stream; the offence was in depositing or leaving the debris from the log in the stream.

In this particular case there was evidence that this was water frequented by fish. There was evidence that the accused made the statement to the fishery officer that he did not know that there were fish in the stream. This was not a defence advanced on behalf of the accused, but an explanation of why he had dragged these logs across the stream. From evidence given in this case and also from judicial notice of the geography of the British Columbia coast and from that which is advanced in argument by both counsel, I have taken into consideration that on the coast of British Columbia where there are substantial logging operations there are innumerable streams, riverlets, and creeks flowing from the land to the various inlets and waters adjacent to the British Columbia coast which is the salt water and portion of the ocean frequented by fish, and that the words of the section "into any water frequented by fish or that flows into such water" includes all these creeks, streams and riverlets of free-flowing water that accumulate and ultimately flow into the ocean no matter how small and whether or not at any particular point, the water is, at that point, frequented by fish.

In interpreting the *Fisheries Act* in general, this section and similar sections, there is substantial body of law following *Regina v. Pierce Fisheries Ltd.*, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591, that these sections create an absolute prohibition and *mens rea* is not a defence. Therefore it is not essential for the Crown to prove that the accused intentionally put the debris in the stream and that if the debris was so deposited in the stream unintentionally, during the normal logging operation, the accused has contravened the provisions of s. 33(3) of the *Fisheries Act*.

I have referred to the size or quantity of the material and the water involved and I have referred to the absolute prohibition to emphasize the scope of the legislation.

In interpreting the effect of s. 33(3), if the size of the debris is not an essential ingredient and the *mens rea* or the knowledge of the logging operator is not an essential ingredient to the charge, and if the size or kind of water, other than being water frequented by fish, is not a matter of proof in the charge, the result then is that a logging operator who carries on a logging operation across a no-name stream and deposits therein a single piece of debris without his knowledge, is committing an offence against this section.

It is not a requirement of the section that the debris injure, damage or effect the preservation of fish. The only requirement of proof by the crown is that the water is water that is frequented by fish or that flows into such water. Considering that the definition of "fish" in s. 2 of the *Fisheries Act* is "any fish, including shell fish and Crustaceans and marine animals, and any part, product or by-products thereof", the scope of the legislation then covers almost all the water in Canada, on the sea coast and inland.

The defence argues that the scope of s. 33(3) is so wide, and since it does not require as proof of the essential ingredient that putting debris in the water does effect any fish, the real effect of the section is to control logging.

The Crown argument is that putting the debris in the stream may affect the fish, and Crown counsel submitted at trial:

My submission is that the legislators recognize what is, in fact, a reality, that logging, lumbering and land clearing and other operations are operations performed in a great number of instances, in the immediate vicinity of water, streams, rivers etc., and subs. (3) of the s. 33 may be no more than specific indication on the part of the federal Crown, that it is this particular area which concerns them. As long as it is related specifically to fishing and fish, within subs. (12) of s. 91 of the B. N. A. Act, then it's not ultra vires of the federal Crown to be specific in terms of what sort of operation they are dealing with. I think that it is a reality that lumbering and land clearing, in many instances, involves skidding logs across streams and falling logs into streams. That is a brief answer to your Honour's question as to why mining and other industries aren't involved and is the only submission that I can make there.

The Crown's argument that s. 33(3) is *intra vires* Parliament is based on the words in the section "frequented by fish". These words do not mean that there are fish in that water, but that sometimes there are fish in that water. The section does not require that the putting of debris shall affect fish. This distinction "water frequented by fish", then, is not a description of a cause or action but is the description of a place. If the words "frequented by fish" were extracted from the section then the section would clearly be *ultra vires* Parliament, the addition of the words "frequented by fish" to the section, then, restricts the water affected by the section, and because there is a possibility that the putting of debris into this water might affect fish, does the section become *intra vires*?

In considering this section, I have used the words "logging" and "debris" because that is the charge in this case, but the analysis of the section applies in the same manner to the words "lumbering, land clearing and other operations" and to the words "any slash or stumps".

The scope of this legislation covers the handling of any wood material by loggers and land clearers in respect to almost any water in Canada. This section would affect every log, piece of lumber or tree that is so placed or dumped into any river, lake, stream or ocean in Canada from which there is detached therefrom any slash, stump or debris. I cannot conceive that the booming operations, the log drives and similar types of logging enterprises could be carried out without depositing some debris into the waters used for that purpose. If s. 33(3) does not require the additional proof that the deposit of the debris affects the preservation of fish then every such booming operation and log drive would be committing an offence against s. 33(3).

It would appear that there are no decided cases on the interpretation of s. 33(3) under the *Constitutional Question Determination Act*. In *Regina v. Pacific Logging Co. Ltd.*, [1974] 5 W.W.R. 523, 18 C.C.C. (2d) 222 Casham, Co. Ct.J. said at p. 530:

The appellant served notice under the Constitutional Questions Determination Act, R.S.B.C. 1960, c.72, upon the Attorney-General for British Columbia and the Attorney-General for Canada. No one appeared on behalf of the Attorney-General for Canada and Crown counsel stated that he had received no instructions from the Attorney-General for British Columbia on this aspect of the matter. Mr. Hutchison argued that s. 33 (3) does not regulate fishing but rather attempts to regulate logging and land clearing being matters of property and civil rights which can only be legislated upon by the Province.

As I have found that the Crown has failed to prove the offence charged, as amended in this Court, I refrain from dealing with the constitutional question.

Regina v. Robertson (1882), 6 S.C.R. 52, in the Judgment of Ritchie C.J. sets out law to be applied in interpreting the B.N.A. Act in respect to s. 91(12), sea coast and inland fisheries, in comparison to the provincial rights of jurisdiction. Ritchie C.J. at p. 110 says:

*In construing the British North America Act, I think no hard and fast canon or rule of construction can be laid down and adopted by which all acts passed as well by the Parliament of Canada as by the local legislatures upon all and every question that may arise can be effectually tested as to their being or not being intra vires of the legislature passing them. The nearest approach to a rule of general application that has occurred to me for reconciling the apparently conflicting legislative powers under the British North America Act, is what I suggested in the cases of *Valin v. Langlois* (1879), 3 S.C.R. 1, leave to appeal refused, 5 App. Cas. 115, and *Citizen's Insur. Co. of Can. v. Parsons*; *Queen Insur. Co. v. Parsons* (1881), 4 S.C.R. 215, 1 Cart. 265, reserved 7 App. Cas. 96, with respect to property and civil rights, over which exclusive legislative authority is given to the local legislatures: that, as there are many matters involving property and civil rights expressly reserved to the Dominion Parliament, the power of the local legislatures must, to a certain extent, be subject to the general and special legislative power of the Dominion Parliament. But while the legislative rights of the local legislatures are in this sense subordinate to the rights of the Dominion Parliament, I think such latter rights must be exercised so far as may be consistently with the rights of the local legislatures, and therefore the Dominion Parliament would only have the right to interfere with property and civil rights in so far as such interference may be*

necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada.

It is the difficulty of applying s. 33(3) "effectually" for the preservation of fish and not the control of logging that is in question in this case. Ritchie, C.J., p. 114 says:

Let us now refer to the sections of the British North America Act bearing on the present case, and guided by considerations such as these, I think the act can be so read as to avoid all conflict and give to each legislative body the full legislative and proprietary rights intended to be conferred by the Imperial Parliament.

By section 91, sub-section 12, is confided to the legislative authority of the Dominion Parliament, 'Sea coast and Inland Fisheries;' to the exclusive power of the provincial legislatures by section 92, sub-section 13, 'Property and civil rights in the provinces;' and, by sub-section 16, 'Generally all matters of a merely local or private nature in the provinces;' and by section 108 certain public works and property specified in schedule 3 are declared to be the property of Canada; and by section 109, 'All lands, mines, minerals and royalties belonging to the several provinces shall belong to the several provinces in which they are situate, subject to any trusts existing in respect thereof and to any interest other than that of the province in the same;' and by section 92, sub-section 5, the exclusive power of legislation is conferred on the provincial legislatures in relation to 'the management and sale of the public lands belonging to the province and of the timber and wood thereon.'

And at pp. 120-21 he says:

...I am of opinion that the legislation in regard to 'Inland and Sea Fisheries' contemplated by the British North America Act was not in reference to 'property and civil rights' - that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection, with which the property in the fish or the right to take the fish out of the water to be appropriated to the party so taking the fish has nothing whatever to do, the property in the fishing, or the right to take the fish, being as much the property of the province or the individual, as the dry land or the land covered with water. I cannot discover the slightest trace of an intention on the part of the Imperial Parliament to convey to the Dominion Government any property in the beds of streams or in the fisheries incident to the ownership thereof, whether belonging at the date of confederation either to the provinces or individuals, or to confer on the

Dominion Parliament the right to appropriate or dispose of them, and receive therefore large rentals which most unequivocally proceed from property in or to which the Dominion has no shadow of claim; but, on the contrary, I find all the property it was intended to vest in the Dominion specifically set forth.

And further, pp. 123-24 he says:

To all general laws passed by the Dominion of Canada regulating 'sea coast and inland fisheries' all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large. Therefore, while the local legislatures have no right to pass any laws interfering with the regulation and protection of the fisheries, as they might have passed before confederation, they, in my opinion, clearly have a right to pass any laws affecting the property in those fisheries, or the transfer or transmission of such property under the power conferred on them to deal with property and civil rights in the province, inasmuch as such laws need have no connection or interference with the right of the Dominion parliament to deal with the regulation and protection of the fisheries, a matter wholly separate and distinct from the property in the fisheries. By which means the general jurisdiction over the fisheries is secured to the parliament of the Dominion, whereby they are enabled to pass all laws necessary for their preservation and protection, this being the only matter of general public interest in which the whole Dominion is interested in connection with river fisheries in fresh water, non-tidal rivers or streams, such as that now being considered, while at the same time exclusive jurisdiction over property and civil rights in such fisheries is preserved to the provincial legislatures, thus satisfactorily, to my mind, reconciling the powers of both legislatures without infringing on either.

Ritchie, C.J., emphasizes the necessity that the Dominion Parliament legislation should be effective, which means that not only should the legislation intend to be effective but it must in fact be effective.

The *Robertson* case was followed and further analysed in *Re B.C. Packers Ltd. and B.C. Council United Fishermen and Allied Workers' Union*, [1974] 2 F.C. 913, 50 D.L.R. (3d) 602 at 615, affirmed [1976] 1 F.C. 375, 64 D.L.R. (3d) 522 (C.A.), by Addy, J. who said:

The subject-matter of the legislation in the present case is labour relations and the product affected is fish. This product is sold and traded within the Province, and the legislation would control the relationship existing between the parties for the sale of fish in the Province. Parliament cannot enact legislation affecting labour relations between fishermen and fish processors in a Province merely under the guise of its powers to regulate trade and commerce, nor does the mere fact that the legislation might possibly enure to the benefit of Canada as a whole displace the jurisdiction of provincial Legislatures in this field afforded them by the property and civil rights provisions under s. 92". (The italics are mine.)

And at pp. 617-18 he says:

The case, in my view, lays down a fairly strict limitation to the jurisdiction of the Parliament of Canada under this head. It limits the competence of Parliament in this field to the regulation, protection and preservation of fisheries and excludes from its jurisdiction the rights of individuals in the fisheries themselves. It would seem to follow a fortiori sic that where the true nature of the subject-matter is the right of individuals to contract as to the proceeds of the catch, it must be excluded as being too remote to be necessarily incidental to or effectively required for the general policing or supervisory powers accorded the federal authority by s. 91(12) over fisheries. The principle in the Robertson case, supra, limiting federal power to the supervision and regulation of fisheries was subsequently followed by the Supreme Court of Canada in a reference entitled Re Jurisdiction over Provincial Fisheries (1895), 26 S.C.R. 444. Chief Justice Sir Henry Strong at p. 519 of this report stated:

...and the legislative authority of Parliament under section 91, subsection 12, is confined to the conservation of the fisheries by what may conveniently be designated as police regulations. As this has already been decided by the case of Regina v. Robertson, supra, which is binding upon me, I consider the decision in that case as settling the existing law. (The italics are Addy J.'s)

If s. 33(3) is *intra vires* the Parliament, what protection or preservation of fisheries is afforded by the section?

The fisheries officer gave evidence that the debris might damage the gravel bed of the stream and destroy the spawning fry or eggs, but this is an offence under s. 30 of the *Fisheries Act*, which states: "30. The eggs or fry of fish on the spawning grounds, shall not at any time be destroyed." (See *Regina v. McTaggart* 1972 3 W.W.R. 30, 6 C.C.C. (2d) 258 (B.C.).)

The fisheries officer gave evidence that branches, leaves and similar vegetation debris cause an oxygen deficiency in the water. This would be the deposit of a deleterious substance and is prohibited under s. 33(2) re-en. R.S.C. 1970, c. 17 (1st Supp.), s. 3 of the *Fisheries Act*.

Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

Therefore, the debris put into water frequented by fish as described in s. 33(3) is debris that is other than that which is a deleterious substance, or causes damage to spawning fry and eggs. What this other damage or injurious effect on the preservation of fisheries might be is not described in the section. Some persons may contemplate how debris put into water frequented by fish would be otherwise injurious to fish, and other persons could contemplate how debris so put into that water would not be injurious to fish or fisheries, but the section itself must be certain and effectual.

Section 33(3) does not prevent the putting of all slash, stumps and debris into water frequented by fish but only such slash, stumps and debris as should originate from "logging, lumbering and land clearing". How is the stump from a miner's blasting that falls into water frequented by fish not as injurious or should not warrant legal restriction the same as that of loggers and land clearers. There is not restriction under s. 33(3) to persons generally putting debris into these waters, it is only the loggers and land clearers who are restricted. The section does control logging operations as opposed to other types of occupations and operations.

Parliament does not have the right to control the putting of the debris in the water as a control of pollution of the water. In *Interprovincial Co-operatives Ltd. and Dryden Chemicals Ltd. v. The Queen in Right of Man.*, 5 W.W.R. 382, [1976] 1 S.C.R. 477, 53 D.L.R. (3rd) 321, Ritchie, J. at pp. 395-96 said:

It appears to me to follow from the above that legislation in respect of water quality and of pollution, including the permitting thereof in interprovincial rivers is clearly within the exclusive legislative authority of the Parliament of Canada under s. 91(12), whereas provincial legislation dealing exclusively with the effect of pollution, including the proof thereof and the measure of damage resulting therefrom, has controlling effect within the territorial limits of the Province by which it is enacted. It follows, in my view, that provincial legislation relating to the recovery of damages for pollution, and indeed creating and controlling an action therefor, against a polluter whose acts done within the Province have occasioned the pollution, is clearly within the provincial domain, whereas the overall authority seized with the regulation and control of pollution in inter-provincial waters just as clearly rests with Parliament.

The Crown's argument in this case is that logging operations are known to leave slash, stumps and debris in water frequented by fish and that this might be detrimental to the preservation of the fisheries.

Where the jurisdiction of the Parliament is in conflict with the right of the Provinces under s. 92 of the BNA Act the authority of Parliament is supreme, but in order for that legislation to be *intra vires* Parliament must be certain and effectual within the jurisdiction of Parliament. In this case s. 33(3) is not certain in that at best it might be effective for the preservation of fisheries in some cases and not in others, and the section is not actual as to which incidences are injurious to the preservation of fisheries. Because of the scope of s. 33(3) it does affect and interfere with logging and lumbering which, under s. 92(5), is within the right of the provinces.

I find that s. 33(3) of the *Fisheries Act* is not certain and effective to exercise the power of Parliament under s. 91(12) of the BNA Act and since it does interfere with the power of the provinces under s. 92(5) and (13), s. 33(3) is *ultra vires* Parliament.

The accused is therefore found not guilty and the charge against him is dismissed.

REGINA v. DAN FOWLER

British Columbia County Court, Ladner, J., April 29, 1977, Powell River, B.C.

Constitutional law -- Fisheries -- Federal legislation prohibiting putting of debris into water frequented by fish -- Intra vires -- The Fisheries Act, R.S.C. 1970, c. F-14, s. 33(3) -- The B.N.A. Act, 1867, s. 91.

Appeal from the judgment of Johnson Prov. J., [1976] 6 W.W.R. 28.

The accused was charged with unlawfully putting debris into water frequented by fish in contravention of s. 33(3) of the Fisheries Act, which stated that "no person engaged in logging, lumbering, land clearing or other operations, shall put ... any slash, stumps or other debris into any water frequented by fish". The accused claimed s. 33(3) conflicted with the legislative power of the province over property and civil rights.

Held, s. 33(3) was intra vires the federal Parliament, as it fell within the principles of legislative paramountcy enumerated in *A.G. Can. v. A.G.B.C. (Reference re Fisheries Act, 1914)*, [1929] 3 W.W.R. 449, [1930] A.C. 111, [1930] 1 D.L.R. 194. The words "or other operations" did not refer to the words "logging, lumbering and land clearing" only, and therefore limited any interference with property and civil rights.

A.G. Can. v. A.G.B.C. (Reference re Fisheries Act, 1914), supra applied.

(Headnote from [1977] 4 W.W.R. 449)

H. J. Wruck, For the Crown (Appellant)
R. Gibbs, For the Defendant (Respondent)

Ladner, J.:--The Respondent was charged that:

COUNT No. 1 that Dan Fowler, from April 27, 1975 to May 27, 1975, while engaged in logging, did UNLAWFULLY put debris into water frequented by fish, to wit: at or near Forbes Bay, in the County of Vancouver, Province of British Columbia, CONTRARY TO THE PROVISIONS OF SECTION 33 OF THE FISHERIES ACT, as amended;

COUNT No. 2 that Dan Fowler, from April 27, 1975 to May 27, 1975, while engaged in logging, did UNLAWFULLY knowingly permit to be put, debris into water frequented by fish, to wit: at or near Forbes Bay, in the County of Vancouver, Province of British Columbia, CONTRARY TO THE PROVISIONS OF SECTION 33 OF THE FISHERIES ACT, as amended."

The respondent appeared for his trial before Provincial Court Judge J.S.P. Johnson on the 23rd day of April, 1976, and pleaded not guilty to both counts.

The trial proceeded and the learned Provincial Court Judge found:

I find that s. 33(3) of the Fisheries Act is not certain and effective to exercise the power of Parliament under s. 91(12) of the B.N.A. Act and since it does interfere with the power of the province under s. 92(5) and (13), s. 33(3) is ultra vires Parliament.

The accused is therefore found not guilty and the charge against him is dismissed.

The Crown appealed to this Court by notice filed July 22, 1976.

Due notice of the desire to challenge the constitutional validity of subsection 33(3) of the *Fisheries Act* was given to the Attorney-General of Canada and to the Attorney-General of British Columbia.

Notice was acknowledged by the Attorney-General of British Columbia, and Mr. Wruck represented the Attorney-General of Canada as well as the Crown.

The charge is laid under the provisions of subsection (3) of Section 33 of the *Fisheries Act*. This provides:

(3) No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.

The respondent, through his counsel, admitted the facts as set forth in the Reasons for Judgment of the learned Provincial Court Judge. These reasons stated:

The facts of the case are that the accused, Dan Fowler, was carrying on a logging operation at a place known as Forbes Bay on the east shore of Humphrey Channel in the County of Vancouver, Province of British Columbia. Dan Fowler was subcontracting the removal of logs and timber from this land for the purpose of the logs being towed away. The evidence indicated that Dan Fowler was carrying on a normal and usual logging operation. As part of the logging operation the logs were removed from the forest by dragging the logs with a caterpillar tractor and in the course of dragging these logs they were dragged across a small stream, which is so small that it has no name. There was no exact measurement of the width of the stream but a photograph would indicate it is a few feet wide. From this logging operation there was debris deposited in the stream bed. From the photograph tendered as an exhibit and from the description given in evidence, the debris consisted of limbs, branches or tops of trees.

This stream flowed into Forbes Bay, which is salt water, part of the coastal water of British Columbia. The stream at some times contained fish; the fishery officer said that the stream was used for the spawning of two species of salmon, coho and pink, and for the rearing of the coho fry.

...

In this particular case there was evidence that this was water frequented by fish.

...

The fisheries officer gave evidence that the debris might damage the gravel bed of the stream and destroy the spawning fry or eggs, ...

The fisheries officer gave evidence that branches, leaves and similar vegetation debris cause an oxygen deficiency in the water.

I accept the finding of the learned Provincial Court Judge that:

In interpreting the Fisheries Act in general, this section and similar sections, there is a substantial body of law following Regina v. Pierce Fisheries Ltd., 12 C.R.N.S. 272, [1971] S.C.R. 5, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591, that these sections create an absolute prohibition and mens rea is not a defence. Therefore it is not essential for the Crown to prove that the accused intentionally put the debris in the stream and that if the debris was so deposited in the stream unintentionally, during the normal logging operation, the accused has contravened the provisions of s. 33(3) of the Fisheries Act.

The relevant portions of the *British North America Act* are:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,-

...

12. Sea Coast and Inland Fisheries."

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,-

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

...

10. Local Works and Undertakings other than such as are of the following Classes:-

a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with

any other or others of the Provinces, or extending beyond the Limits of the Province:

- b. Lines of Steam Ships between the Province and any British or Foreign Country:*
- c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.*

...

13. Property and Civil Rights in the Province.

This issue was raised in *Regina v. Pacific Logging, Co. Ltd.*, [1974] 5 W.W.R. 523, 18 C.C.C. (2d) 222, but Cashman, C.C.J. said:

As I have found that the Crown has failed to prove the offence charged, as amended in this Court, I refrain from dealing with the constitutional question.

In *Regina v. Robertson* (1882), 6 S.C.R. 52 at page 110, Ritchie, C.J. says:

"The nearest approach to a rule of general application that has occurred to me for reconciling the apparently conflicting legislative powers under the British North America Act, is what I suggested in the cases of Valin v. Langlois (1879), 3 S.C.R. 1, leave to appeal refused, 5 App. Cas. 115, and Citizen's Insur. Co. of Can. v. Parsons; Queen Insur. Co. v. Parsons (1881), 4 S.C.R. 215, 1 Cart. 265, reversed 7 App. Cas. 96, with respect to property and civil rights, over which exclusive legislative authority is given to the local legislatures: that, as there are many matters involving property and civil rights expressly reserved to the Dominion Parliament, the power of the local legislatures must, to a certain extent, be subject to the general and special legislative power of the Dominion Parliament. But while the legislative rights of the local legislatures are in this sense subordinate to the rights of the Dominion Parliament, I think such latter rights must be exercised so far as may be consistently with the rights of the local legislatures, and therefore the Dominion Parliament would only have the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada.

and commenting at page 120 Ritchie, C.J. says further:

...I am of opinion that the legislation in regard to 'Inland and Sea Fisheries' contemplated by the British North America Act was not in reference to 'property and civil rights' - that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and

increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection, with which the property in the fish or the right to take the fish out of the water to be appropriated to the party so taking the fish has nothing whatever to do, the property in the fishing, or the right to take the fish, being as much the property of the province or the individual, as the dry land or the land covered with water. I cannot discover the slightest trace of an intention on the part of the Imperial Parliament to convey to the Dominion Government any property in the beds of streams or in the fisheries incident to the ownership thereof, whether belonging at the date of confederation either to the provinces or individuals, or to confer on the Dominion Parliament the right to appropriate or dispose of them, and receive therefore large rentals which most unequivocally proceed from property in or to which the Dominion has no shadow of claim; but, on the contrary, I find all the property it was intended to vest in the Dominion specifically set forth.

and commencing at page 123 Ritchie, C.J. says further:

To all general laws passed by the Dominion of Canada regulating 'sea coast and inland fisheries' all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large. Therefore, while the local legislatures have no right to pass any laws interfering with the regulation and protection of the fisheries, as they might have passed before confederation, they, in my opinion, clearly have a right to pass any laws affecting the property in those fisheries, or the transfer or transmission of such property under the power conferred on them to deal with property and civil rights in the province, inasmuch as such laws need have no connection or interference with the right of the Dominion parliament to deal with the regulation and protection of the fisheries, a matter wholly separate and distinct from the property in the fisheries. By which means the general jurisdiction over the fisheries is secured to the parliament of the Dominion, whereby they are enabled to pass all laws necessary for their preservation and protection, this being the only matter of general public interest in which the whole Dominion is interested in connection with river fisheries in fresh water, non-tidal rivers or streams, such as that now being considered, while at the same time exclusive jurisdiction over property and civil rights in such fisheries is preverved to the provincial legislatures, thus satisfactorily, to my mind, reconciling the powers of both legislatures without infringing on either.

I am accepting as guidance in this case the above quoted statements. The matter to be decided in *Regina v. Robertson* was as to the validity of a "lease of fishery" of a river from the Dominion Government as against the owners of conveyances of a portion of the river. The matter to be decided in the present case is whether subsection (3) of Section 33 of the *Fisheries Act* being a Dominion Statute conflicts or competes with the legislative power of the Legislature of the Province of British Columbia "over property and civil rights beyond what may be necessary for

legislating generally and effectively for the regulation, protection and preservation of the fisheries in the interests of the public at large."

In *Grand Trunk Railway Company of Canada v. Attorney-General of Canada*, [1907] A.C. 65 commencing at page 67 Lord Dunedin adopted the two propositions which he stated were established in *Attorney-General of Ontario v. Attorney-General of Canada*, [1894] A.C. 189 and *Tennant v. Union Bank of Canada*, 1894 A.C. 31, namely:

First, that there can be a domain, in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.

Certainly in the present case the field would seem to be clear for the Dominion Parliament to enact the subsection in question under subsection 12 of Section 91 of the *British North America Act*.

The learned Provincial Court Judge in his judgment in this case stated:

If s. 33(3) is intra vires the Parliament, what protection or preservation of fisheries is afforded by the section?

The fisheries officer gave evidence that the debris might damage the gravel bed of the stream and destroy the spawning fry or eggs, but this is an offence under s. 30 of the Fisheries Act, which states: '30. The eggs or fry of fish on the spawning grounds, shall not at any time be destroyed.' (See Regina v. McTaggart, [1972] 3 W.W.R. 30, 6 C.C.C. (2d) 258 (B.C.).)

The fisheries officer gave evidence that branches, leaves and similar vegetation debris cause an oxygen deficiency in the water. This would be the deposit of a deleterious substance and is prohibited under s. 33 (2) (re-en. R.S.C. 1970, c. 17 (1st Supp.), s. 3) of the Fisheries Act.

(2) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

Therefore, the debris put into water frequented by fish as described in s. 33(3) is debris that is other than that which is a deleterious substance, or causes damage to spawning fry and eggs. What this other damage or injurious effect on the preservation of fisheries might be is not described in the section. Some persons may contemplate how debris put into water frequented by fish would be otherwise injurious to fish, and other persons could contemplate how debris so put into that water would not be injurious to fish or fisheries, but the section itself must be certain and effectual.

With respect I cannot agree with this reasoning. The overlapping of two subsections with respect to the actions being forbidden does not vitiate the part of the

one or the other subsection but rather subsection (3) provides more certainty with respect to the type of action forbidden.

Again at pages 38 and 39 the learned Provincial Court Judge continues:

Section 33(3) does not prevent the putting of all slash, stumps and debris into water frequented by fish but only such slash, stumps and debris as should originate from 'logging, lumbering and land clearing'. How is the stump from a miner's blasting that falls into water frequented by fish not as injurious or should not warrant legal restriction the same as that of loggers and land clearers. There is no restriction under s. 33(3) to persons generally putting debris into these waters: it is only the loggers and land clearers who are restricted. The section does control logging operations as opposed to other types of occupations and operations.

In this paragraph a restrictive interpretation has been put on the words "or other operations" in apparently relating the words to "logging, lumbering and land clearing" only.

With respect I cannot agree. The slash and stumps would generally result from logging, lumbering and land clearing but the words "or other operations" and the words "into any water frequented by fish" may to some extent duplicate subsection (2) but also limit any interference with property and civil rights and create effective legislation with respect to the powers reserved to the Dominion Parliament under subsection 12 of Section 91 of the *British North America Act* and in particular the words "or other operations" would make the legislation in fact effective.

In *Attorney-General for Canada v. Attorney-General for British Columbia*, [1930] A.C. 111 at 118 Lord Tomlin said:

Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated:-

(1) *The legislation of the Parliament of the Dominion, so long as it strictly related to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s. 92: see Tennant v. Union Bank of Canada. ([1894] A.C. 31).*

(2) *The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: see Attorney-General for Ontario v. Attorney-General for the Dominion. (1896 A.C. 348).*

(3) *It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the*

provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91: see *Attorney-General of Ontario v. Attorney-General for the Dominion* [1894] A.C. 189; and *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348.

(4) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see *Grand Trunk Ry. of Canada v. Attorney-General of Canada*, [1907] A.C. 65.

The subsection impugned by the respondent in this case would comply with these propositions.

I find that Section 33(3) of the *Fisheries Act* is *intra vires* the Parliament of Canada.

I appreciate the very helpful submissions of counsel for the appellant and the respondent.

I have only had submissions from counsel with respect to the validity of the legislation and will hear submissions with respect to the facts.

REGINA v. DAN FOWLER

**British Columbia Court of Appeal, Farris, C.J.B.C., Craig, J.A., Lambert, J.A.,
October 16, 1978**

Constitutional law -- Fisheries -- Federal legislation prohibiting putting of debris into water frequented by fish -- Intra vires -- The Fisheries Act, R.S.C. 1970, c. F-14, s. 33(3) -- The B.N.A. Act, 1867, ss. 91(12), 92.

Appeal from the judgment of Ladner, Co. Ct. J., [1977] 4 W.W.R. 449, 36 C.C.C. (2d) 297, reversing [1976] 6 W.W.R. 28, who held that s. 33(3) of the Fisheries Act was intra vires the federal Parliament.

The accused was charged under s. 33(3), which provided that "No person engaged in logging, lumbering, land clearing or other operations, shall put ... any slash, stumps or other debris into any water frequented by fish.

Held, the appeal was dismissed. The legislation was clearly in relation to the matter of inland fisheries and the preservation of fish and was intra vires.

A.G. Can. v. A.G. B.C.; Re Fisheries Act, 1914, [1930] A.C. 111, [1929] 3 W.W.R. 449, [1930] 1 D.L.R. 194 (P.C.) applied.

Note up with 4 C.E.D. (West. 2nd) *Constitutional Law*, s. 41.

(Headnote from 1979 1 W.W.R. 285)

H.J. Wruck, for the Crown (Respondent)

R.C. Gibbs, for the Defendant (Appellant)

R.B. Hutchinson and D. Robbins, for the Attorney-General of British Columbia (Intervenor)

Farris, C.J.B.C.:--This is an appeal from a conviction 1977 4 W.W.R. 449, 36 C.C.C. (2d) 297, reversing [1976] 6 W.W.R. 28 (b.C.) on a charge:

...that Dan Fowler from April 27, 1975 to May 27, 1975, while engaged in logging did unlawfully put debris into water frequented by fish, to wit: at or near Forbes Bay, in the County of Vancouver, Province of British Columbia, contrary to the provisions of Section 33 of the Fisheries Act.

The appellant is a logging subcontractor who apparently was carrying on operations. It is conceded that the acts that he performed constitute a contravention of s. 33(3) of the *Fisheries Act*, R.S.C. 1970, c. F-14, and the sole issue in this appeal is as to the constitutional validity of s. 33(3).

Under the *B. N. A. Act*, s. 91(12), the Parliament of Canada has jurisdiction over coast and inland fisheries. Also under the *B.N.A. Act*, by s. 92, the provinces have jurisdiction over the management and sale of lands, local works and undertakings, property and civil rights. The issue here is: is this legislation in respect to a matter that is within the jurisdiction of the Parliament of Canada?

It seems to me the principle that we are concerned with is that set out in *A.G. Can. v. A.G. B.C.; Re Fisheries Act, 1914*, [1930] A.C. 111, [1929] 3 W.W.R. 449 at 452, [1930] 1 D.L.R. 194 (P.C.) where Lord Tomlin said this:

Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated:

(1) The legislation of the Parliament of Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in sec. 91, is of paramount authority even though it trenches upon matters assigned to the provincial Legislatures by sec. 92: see Tennant v. Union Bank of Can., [1894] A.C. 31.

Section 33(3) must be considered in this context.

Although there may also be earlier sections dealing with the preservation of fish, s. 33(1) prohibits the throwing overboard of:

...ballast, coal ashes, stones, or other prejudicial or deleterious substances in any river, harbour or roadstead, or in any water where fishing is carried on, or leave or deposit or cause to be thrown, left or deposited, upon the shore, beach or bank of any water or upon the beach between high and low water mark, remains or offal of fish, or of marine animals, or leave decayed or decaying fish in any net or other fishing apparatus; such remains or offal may be buried ashore, above the high water mark.

Section 33(2) re-en R.S.C. 1970 (1st Supp.), c. 17, s. 3 sets out:

(2) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

Section 33(3) sets out:

(3) No person engaged in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.

In addition there is evidence here, accepted by all, given by the fisheries officer, that the depositing of debris in creeks can have deleterious effects. The first and most obvious -- and I am paraphrasing the evidence of the fisheries officer --- is:

...blockage of the creek -- access of the fish migration...

The second and perhaps more important problem is the biological oxygen demand, as this material deteriorates over the years, it requires oxygen from the

water to break it down in the rotting procedure. This oxygen is in high demand from the fish both as eggs in the gravel and also in the area as fry.

There may also be damage to spawning beds, fry and gravel beds.

Taken in this context, it seems to me that this is legislation clearly in relation to the matter of inland fisheries, and particularly to the preservation of fish.

The submission made by counsel for the appellant, supported in effect, though not in these words, by counsel for the Attorney-General, that the legislation, s. 33(3), is really legislation regulating logging, seems to me, I say with great deference, to be divorced from reality. In my view, it comes clearly within the proposition quoted from Lord Tomlin, and I would, accordingly dismiss the appeal because, in my view, s. 33(3) is valid legislation and within the competence of the Parliament of Canada.

Note: See page 286 for judgment of the Supreme Court of Canada.

REGINA v. BRITISH YUKON NAVIGATION COMPANY LIMITED

Yukon Territory Magistrate's Court, O'Connor, Mag., Whitehorse, May 21, 1976

Environmental law -- Water pollution -- Sentence -- Oil spill -- Deposit of deleterious substance in water frequented by fish -- Twelve hundred and fifty dollar fine -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5)

The accused plead guilty to a charge under s. 33(2) of the Fisheries Act after several thousand gallons of fuel oil overflowed a tank being filled by its employee and entered a nearby creek.

Held, the appropriate fine under the circumstances was twelve hundred and fifty dollars. While the employee had failed to monitor the filling operation adequately, the company did not report the incident, and the dike surrounding the tank in question was inadequate to contain the oil, the offence was not in the most serious category. The previous good record of the accused and the remedial action it took as a result of this incident justified a fine substantially less than the maximum provided for by law.

P. O'Brien, for the Crown.

T. McBride, for the accused.

Mr. McBride: Appearing, Your Worship, as agent.

O'Connor, Mag.: Are you ready to plead to the charges?

Mr. McBride: Yes, Your Worship.

O'Connor, Mag.: Read the charge.

Mr. McBride: I'm instructed to enter a guilty plea on that, Your Worship. There are two other matters, Your Worship, one I understand relating to approximately the same time that is not being proceeded with.

Mr. O'Brien: That's correct. I wonder if we could have all the charges read. It's a little bit difficult because there is no particularization on the charges on the docket, and one will be withdrawn. However, until we get the charges read.

O'Connor, Mag.: All right. Read the other two then.

CHARGE READ PLEA GUILTY

O'Connor, Mag.: The third charge.

CHARGE READ

Mr. O'Brien: Perhaps we can check. Has there been a plea taken on the first count?

O'Connor, Mag.: There is a plea of guilty to the first count, plea of guilty to the second count, and there has been no plea to the third count.

Mr. O'Brien: I'd ask that the third matter be marked withdrawn.

O'Connor, Mag.: The third charge will be withdrawn at the request of the Crown.

Mr. O'Brien: With regard to the matter on April 11th, 1976, at approximately 2:40 p.m., there was a report of a tanker travelling up the Two-mile Hill apparently spilling fuel from a rear tank. This was witnessed by Constable Bill Hensley of the R.C.M.P. The truck was stopped, the driver identified as one Tony Bazilinski, and Corporal Knowles apparently arrived on the scene, went to the top of the tank, had the driver open the rear compartment, and the fuel was within apparently 3 1/2 inches of the open dome, approximately 5 inches above the full marker in the tank. The front compartment was then opened for comparison and the fuel level was 11 inches below the top dome and below the fuel level marker. Approximately 100 gallons was pumped off the rear compartment to bring the tank down to the full marker. There was a fuel track on Two-mile Hill starting at a point just beyond the turn on Industrial Road toward the hill. The trail continued upwards beyond the top of the hill. The greatest showing of fuel was about the center of the hill. The track was identified as having come from the fuel spill from the truck in question. This fuel is apparently very hard on the road surface, and it makes conditions on the hill very slippery because of the oil base. It is also a fire hazard, which is not severe though it does exist. Those are the facts on that particular charge.

O'Connor, Mag.: That is on the second count, is that correct?

Mr. O'Brien: Yes, that is the second count.

O'Connor, Mag.: Are those facts admitted, Mr. McBride?

Mr. McBride: Yes, they are, Your Worship.

O'Connor, Mag.: Then on the plea of guilty and the admitted facts there will be a conviction on the second count.

Mr. O'Brien: On the first charge, Your Worship, the spill was in Faro. I'm informed that in this particular instance the background is that these trucks owned by White Pass carry fuel to a pumping station or reservoirs. At this particular time a driver identified as Mr. Trigg; Norman Trigg, of Porter Creek, apparently was carrying out this action by delivering fuel to these fuel tanks, and on the date and time in question, he hooked his truck up to a tank which apparently was more full than he was aware, and when he unloaded his fuel he did not remain near the tank to observe the fuel level rising in the tank. There was no watch kept and the fuel was spilled over the top. The situation is that, according to Regulations, the fuel tanks are

supposed to be surrounded by an impermeable dike, so that in the event that a spill does occur the material that is spilled does not leak out and damage the environmental balance. This dike, however, apparently was not impermeable. The amount of oil spilled within the dike rose up to about a foot on the wall of the dike and the next morning was found to be - the dike was found to be empty, the oil having permeated through the wall of the dike into the ground. There is some dispute with my friend concerning the amount of oil that was spilled. The indication that we had is that there was somewhere in the neighbourhood of 6,000 gallons spilled.

O'Connor, Mag.: Into the dike?

Mr. O'Brien: Into the dike, yes. This spillage was not reported. It was found by an R.C.M.P. officer, I'm informed, who apparently noticed the oil slick or traces of oil on Van Gorda Creek. He traced these oil traces back to this particular dike, and an investigation was made, and at that time the source of the spillage was identified. Those are the facts which I have on my file, Your Worship.

O'Connor, Mag.: Mr. McBride?

Mr. McBride: Your Worship, those facts are substantially admitted. There are two areas that I would comment on. Firstly, I am instructed that the day after this incident happened the attendant at the bulk plant where the fuel was off-loaded dipped the tanks, and in reporting to the driver, Mr. Trigg, two days later indicated to him that the spill had been in the amount of 3,787 gallons. Now, that's my information, and we are admitting to that.

With respect to the actions of the driver himself during the off-loading, I am instructed that what had happened was the intake manifolds for two separate tanks were side by side, one for one type of petroleum product, and one for another, and the fuel from the petroleum product from one of these tanks was pumped into the tank, the furnace oil tank, which eventually overflowed for purposes of cleaning the tank that had emptied, and this wasn't brought to the driver's attention, and when he came and hooked up he wasn't aware of the extra oil that had been pumped into the tank that he was pumping into, and consequently the overflow resulted. I'm advised that there is no means of checking the level in the tank short of taking the top off and dipping or looking in with a flashlight or other means of illumination. There's no gauge that one can check. I'm advised that the normal procedure with respect to loading in tanks is to have - to know the level in the tank and then fill up to that level.

O'Connor, Mag.: There is a requirement that someone should attend though during --

Mr. McBride: My advice is again on the statement of Mr. Trigg, the driver, "My next load on September 21st was all stove oil, (7,000 gallons) and I pulled into the agency as usual and hooked up to the same manifold as

before ... It was dark and raining at the time. The floodlights mounted at the off-loading area illuminate the stem, the yard area and my truck as I unloaded. During the off-loading process (1 hour) I was moving back and forth around my rig monitoring the operation of my pump ..." That's the statement of the driver.

O'Connor, Mag.: It is hard to understand that if he was being very attentive that they could spill 3700 gallons.

Mr. McBride: I'm saying that not to excuse the driver's actions, but --

O'Connor, Mag.: Well, on the plea of guilty and the facts as admitted, there will be a conviction on that charge as well. Previous convictions?

Mr. O'Brien: No, there are no previous convictions that the Crown is alleging, Your Worship. However, with regard to sentence I'd ask Your Worship to take into consideration the seriousness of this type of offence with regard to environment in the area. Several studies have been made with regard to the effects of this type of deleterious material on the environment. With regard to this particular substance there is a continuous discharge, and this has been based on the experience at Canada Tungsten in 1973. This material, apparently there is no way of stopping it from - there's no way of cleaning it up or stopping it. There is a continuous discharge until the amounts are so little left in the area that they are no longer deposited into the creek beds.

There's also the situation of the disruption of the spawning population of the grayling and other fish that are down in Van Gorda Creek, and that I think should be taken into consideration when Your Worship considers sentence. The flesh of these fish which are caught by the people of Faro and other sportsmen and people passing through the area is tainted by this type of material being deposited in the water, and a situation similar to this was documented apparently in the Haines-Fairbanks pipeline near Dezdeash Lake in 1968, and if the experience gained from that documentation is any indication, it certainly does have a serious effect on the fish population in the area. There's also the question of the reduced recreational potential in the area as a result of oil slicks being continually deposited, or oil slicks continually appearing in the river. The outstanding features of the offence itself I think are the fact that a proper watch wasn't kept. The offence wasn't reported, and in fact the dike was not such as is required in order to stop this type of problem from occurring. The Regulations are such as to impose a duty on people handling this type of material, and this duty was breached certainly in this case in several ways, not the least of which is not having a proper dike to contain an oil spill, and certainly there was a breach of duty by not reporting this matter. I think Your Worship should perhaps take those factors into consideration.

O'Connor, Mag.: Thank you, Mr. O'Brien.

Mr. O'Brien: I believe also the sentence in this type of offence has recently been changed. It is now a maximum fine of \$5,000.00.

O'Connor, Mag.: Yes, I am aware of that. Mr. McBride?

Mr. McBride: Well, Your Worship, this offence involves White Pass, one of the major companies within the Territory, and I would draw Your Worship's attention that this, as my friend has indicated, is the first offence under this Act that the Company has been charged with. In terms of the amount of oil spill which we admit is in the neighbourhood of 3800 gallons - in terms of the total fuel handled by that Company it is miniscule. I'm instructed that in 1975 something in excess of 43,000,000 gallons was handled by that Company in the Yukon Territory. In light of that immense volume of fuel I would submit that this is a minor spill. Immediately after the spill occurred the company - - immediately after the spill was brought to the Company's attention, and the Company can only regret that the matter was not reported by the Company itself, there was simply a lack of communication between the people who knew of the spill and the people whose duty it is in the Company to report the spill to the various environmental agencies, and the Company can do nothing but regret that, and as I say immediately after a series of memos were sent from the Executive Office in Vancouver to the various officers in Whitehorse and in the Yukon Territory specifying the action to be taken in the case of spills. I understand that these memos have been made available to the employees of the Company, and hopefully the non-reporting at least of this incident will not occur again.

I would submit that it is not - the non-reporting, it was certainly not intentional, it was simply a regrettable lack of communication within the Company itself. Steps as I say have been taken to hopefully avoid that problem in the future. I am instructed that the Company itself has had friendly relations with the environmental protection people, and that they have in the past and continue to make every effort to co-operate with the various agencies.

With respect to the incident itself, Your Worship, I would submit that it's one of employee error. The driver simply did not have the knowledge that he should have had admittedly, and erred in filling a tank that had more fuel in it than he was aware of. I would submit that that is a different circumstance than a spill that would occur as a result of a management decision to take a certain course of action which ran a risk of spill, and which the spill then occurred, or the deleterious substance managed to get into a waterway. I would submit that there is a difference between that sort of case and this case, and that should be taken into account by Your Worship.

Certainly there's no benefit to the Company by this sort of action. They have lost either 6,000 or 3800 gallons, and it's not the sort of decision that they would hope would recur, and I think that points out the difference between the two types of cases. The incident in my

submission is a freak accident that is unlikely to occur. The damage that has resulted, Your Worship, certainly with respect to the potential damage, the gallonage as I would submit not large in terms of spills that can occur. Your Worship has recently dealt with one case that the amount that was involved was somewhere between seventy and a hundred and fifty million gallons. I submit that in comparison this spill is indeed a minimal one. I have been provided with a copy of the report by the environmental protection people, and I would like to indicate several parts of the report. The report was prepared by a W. Robson. He indicates that the amount of oil entering the creek to be between 10 and 20 gallons per day. This report was made in October of 1975, Your Worship, some one month after the spill. "Once in the creek the oil can be seen in concentrations at only two locations; one near a culvert at a road crossing, and two, in a back-water where the creek meets the river. The slick is extremely thin, and once the oil is in the Pelly River proper, disappears altogether." I would submit that in terms of actual potential damage that again indicates that the problem is not of great magnitude. My friend has indicated the problem of the spawning of the grayling, and without wishing to give evidence, Your Worship, it's my understanding that grayling spawn in spring, and this incident occurred in the fall. Possibly if the amount is still being dispersed into the creek, and we have no information on that, it may well affect that, but my submission is that the incident occurred in the fall, and there doesn't appear to be any indication that it continues to be a problem, but I have no knowledge on that, so I don't wish to make a representation to that effect.

Again, my friend's comments with respect to the reduced recreational potential of the area, I simply don't know whether Van Gorda Creek is a recreational area that people fish in, or whether sewage from the town of Faro goes through it. I just don't know, and I'm not prepared to make any submission with respect to that.

O'Connor, Mag.: Can you comment on the dike, Mr. McBride, the suitability of it at that time, and whether or not any steps have been taken to rectify the situation?

Mr. McBride: I am advised, Your Worship, that the comment my friend made with respect to the mark up the side of the dike is a seepage problem rather than what I had inferred from the comment, and obviously Your Worship had, that this dike filled up and seeped out. As I understand it, what happened was that as the oil spilled out from the tank it would immediately seep into the ground, and the oil would also seep up the sides of the dike rather than --

O'Connor, Mag.: Fill up.

Mr. McBride: Be contained in the dike for a period of time, and then seep out of it. I'm also instructed that the dike itself is some distance from the creek in question, and in terms of percentage of fuel, of oil, that

would get to the creek it would be some small, or some portion of the actual amount spilled because it would be dispersed into other areas of the creek. With specific reference to your question, the environmental protection people have not requested any action in this regard, and none has been taken by the Company with respect to changing the dike to make it contain any spills.

O'Connor, Mag.: Is that your information, Mr. O'Brien?

Mr. O'Brien: I have no information on that, Your Worship, unfortunately.

O'Connor, Mag.: It seems odd that that is one of the complaints that they are making, is the inadequacy of the dike.

Mr. McBride: Well, if it is, they haven't conveyed it to the Company.

Mr. O'Brien: There may be a request in future whatever the results of this.

Mr. McBride: I have dealt with the facts, Your Worship. If I may have a comment or two with respect to the principle, and much of what I have said is perhaps not relevant to the actual guilt of the Company. However, I would submit that the prime principle which Your Worship should consider is one of deterrence, and much of what I have said is relevant with respect to sentence. I would submit that the fact that this is a simple error, that it's simple in error, my submission is an indication that the penalty to be considered should be somewhat less than if the incident had been an intentional one, and the point I'm making is that deterrence is - it's hard to see how deterrence is relevant where there is error involved. To err is human, and the ability to deter error is in terms of penalty imposed, I think is less successful than if the actions had been intentional. I would also like Your Worship to consider Mr. Justice Maddison's comments with respect to the worst case principle in the recent Regina v. Cyprus Anvil where he considered that case, and reduced the fine by an amount of \$500.00, but indicated that he would have reduced it substantially more if certain things after the fact had not happened, the continuing to keep the dike open as I recall.

In any event, Your Worship, I'd just emphasize with respect to the aspect of sentence that in fact in my submission rather, this was a matter of an employee of the Company whose actions the Company is responsible for, and readily admits that responsibility, but in degree both in the amount of the spill and the management involvement in the incident is minimal.

O'Connor, Mag.: I will take 5 minutes and I will give my judgment.

AFTER ADJOURNMENT MAY 21st, 1976

O'Connor, Mag.: Dealing first of all with the charge under the Fisheries Act, the principle to be considered by the court in determining the appropriate sentence, first of all that of deterrence to this Company and other companies or persons, and also the need to indicate the degree of seriousness of the offence that has occurred. The facts disclose here that the driver of the truck made a mistake in not ascertaining the amount of the substance already in the tank when he commenced to off-load his truck. Mr. McBride has pointed out that this is an understandable human mistake, and I am sure that despite all precautions such mistakes will occur from time to time. The situation becomes somewhat more serious in light of a number of things that occurred thereafter. The driver failed to keep a sufficient watch on the filling process. Had he done so the spill no doubt to a large extent would have been avoided. It is true that this is an error, or a fault, committed by the employee of the defendant Company. However, the Company must assume responsibility for that. The matter was not reported as required. It is not clear from the facts which are before me whether or not reporting it would have made a difference in preventing environmental damage. This again was a failure by an employee or employees of the Company. However, again the Company must be held accountable for that. Finally, there is the matter of the dike which proved to be insufficient in order to contain the spill that occurred, and the primary responsibility for protecting the environment from a spill of this sort lies with the Company, and apparently whatever provision had been made in this case was insufficient to prevent some fuel from reaching the Van Gorda Creek. The matters that I have referred to in my view take this case out of the least serious type of violations of the Fisheries Act to which the lowest range of fines would be appropriate.

On the other hand this is a single incident. The White Pass Company carries on a very large volume of business in the Territory. There is no suggestion of any previous problems of a similar nature, and indeed there has been no convictions registered against the Company. The Company has responded with an obvious concern for what happened here, and has taken steps within its internal organization to try to ensure that this type of driver error, and this type of spill, will not recur. The amount that went into the creek itself cannot precisely be determined, but I think it is fair to say that it is not a massive amount, as was in the case of the Faro tailings spillage last year, and in the case of other spills that the courts of the north have dealt with. These factors in my view take this case out of the more serious range of cases that are dealt with under the Fisheries Act.

Parliament has provided in the Fisheries Act for fines for conviction under this section up to the amount of \$5,000.00, and the company in this case will be fined in the amount of \$1250.00, in default distress.

With respect to the charge under the Gasoline Handling Ordinance, the considerations are different. There will be a fine in the amount of \$200.00, in default distress.

REGINA v. NORTH ARM TRANSPORTATION CO. LTD.

British Columbia Provincial Court, Sarich, Prov. Ct. J., Campbell River, B.C., May 4, 1976

Environmental law -- Water pollution -- Permitting the deposit of deleterious substance in water frequented by fish -- Oil Spill -- Accused's employee overfilling on-shore tank from company's barge -- Accused denied defence of all due diligence because of failure to enforce proper procedures -- Accused convicted -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2), 33(8).

Environmental law -- Water pollution -- Permitting the deposit of deleterious substance in water frequented by fish -- Oil Spill -- Accused's employee accepting tug boat as deck cargo -- Tug boat leaked diesel oil into ocean on account of negligent conduct of employees -- Accused denied defence of all due diligence -- Accused convicted -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2), 33(8).

The accused corporation was charged with two counts of permitting the deposit of diesel fuel in water frequented by fish, contrary to s. 33(2) of the *Fisheries Act*.

Count 1 arose when fuel overflowed from an on-shore tank which was being filled from the company's barge by its employee.

Held, the accused was found guilty, as the defence provided by s. 33(8) was not available to it. Even though its officers had trained the employee properly in the correct procedures for handling fuel, their failure, through an absence of supervision, to ensure compliance with those procedures and to ensure an adequate standard of care denied the corporation the defence of "all due diligence".

Count 2 arose from an incident which occurred after the accused employees accepted as deck cargo on the same barge a small tug boat which later leaked diesel fuel into the ocean. The accident occurred because of the way in which the tug was loaded onto the barge.

Held, the accused was guilty. Responsibility for the tug shifted from its owner to the accused once its employees accepted the cargo. Their negligent conduct in transporting it in such a way as to allow the escape of fuel was sufficient to deny the accused the "due diligence" defence.

R. v. North Arm Transportation Co. Ltd.

The Queen v. Pierce Fisheries Ltd., [1970] 5 C.C.C. 193; *R. v. Churchill Copper Corporation Ltd.*, [1972] 5 C.C.C. (2d) 319; *H.L. Bolten (Engineering) Co. Ltd. v. T.J. Graham and Sons Ltd.*, [1957] 1 Q.B. 159.

S. Stirling, for the Crown.

P.D. Lowry, for the Accused.

Sarich, J.:--The accused company is charged on an information containing two counts laid under Section 33(2) of the *Fisheries Act of Canada*, alleging that the accused company did:

- Count 1 On or about the 1st day of March, 1975, at or near Kendrick Inlet, in the County of Nanaimo, in the Province of British Columbia, permit the deposit of a deleterious substance, a petroleum product, in water frequented by fish, to wit: Kendrick Inlet, and:
- Count 2 On or about the 2nd day of March, 1975, at or near Gold River, County of Nanaimo, Province of British Columbia, permit the deposit of a deleterious substance, a petroleum product, in water containing fish, to wit: Matchlee Bay.

On this information, the accused company pleaded not guilty to both counts and the trial was held on the date set out above.

The facts established in evidence before me relating to Count No. 1 are as follows:

Late in the evening of February 28th, 1975 (about 10:00 P.M. to 11:00 P.M.) the tug the North Arm Prowler towing the fuel barge the North Arm Express arrived at Stoltz's logging camp in Kendrick Inlet on the West Coast of Vancouver Island. At the time, both the tug and the barge were owned and being operated by the Defendant company in its business of delivering petroleum products to logging camps and other small communities along the Coast of British Columbia. The barge was secured to the wharf at Stoltz's camp and the Defendant company's barge-man, one Jeffery P.J. Watt, set about the business of delivering diesel fuel into the tanks of a tank farm set on a hill about one-quarter of a mile from the wharf. At all material times Watt was the employee of the Defendant company, having been hired in July, 1974 and working for the company continuously until he left its employ in July of 1975.

After assuring that the barge was secure to the wharf, Watt took the hoses from off the barge and hooked these up to the appropriate "risers" or pipe connections on the wharf that led to Stoltz's tank farm. After this, he walked up to the tank farm which was situated on a sand and gravel hill, about 1/4 miles from the wharf, about 300 to 500 feet above tide water and about 300 feet distant from the beach.

At the tank farm Watt looked in all the tanks -- he believes six -- and determined that two of them which held diesel fuel were "bone dry", and that all the others were sufficiently full. In coming to this determination, he climbed a ladder to the top of each tank, opened a manhole on the top and shone a flashlight down into the tanks. The night was dark - I believe it to have been raining at the time and there was no artificial light in the area except Watt's flashlight.

Watt also checked another large tank near the camp itself and some considerable distance from the tank farm, and determined that it also required filling.

At this stage Watt shut all valves except those leading into the two tanks in the tank farm which he intended to fill, and he opened the valves leading into these two tanks. After this he walked back down the pipeline to the wharf, making a visual

inspection as he went. He then went onto the barge, checked all valves to ensure that he would be drawing the proper fuel and took and recorded the meter readings. Following this, he went back up the pipeline to the tank farm to double check the valves, then came back to the barge and started pumping.

After he started the pumps working on the barge, Watt went up the pipeline again to check all connections for leaks and climbed up each of the two tanks and looked in to satisfy himself that diesel fuel was entering each tank. Watt kept the pumps operating for from one to two hours, during the course of which time he made about five checks of the pipeline and tanks.

During his last check, he got about half-way to the tanks from the barge and noticed that one of the tanks was overflowing. Oil was cascading down the sides of the tank from openings at the top of the tank. He ran back, shut the valves at the "risers" and then shut off the pumps on the barge.

Watt went immediately to the tank farm to check the effects of the spill. The tank farm sits on a sand and gravel hill, one side of which runs steeply down to a dirt road near the water's edge. Watt states that the sides of the tank were coated with diesel oil; there was a coating of oil and slime on the surface sand and gravel around the tanks, but that he saw no pools of oil or any oil "running in a river" down the hill. He also states he checked with his flashlight around the base of the hill, the road and the beach but saw nothing significant. Accordingly he went back and filled the third tank near the camp and then shut all the delivery system down, disconnected and stowed his hoses back on the barge and prepared his delivery invoice and bill for the camp operator. He did not report the spill from the tank overflow because he computed it roughly to be only 200 gallons at the maximum and he was satisfied it was all soaked up by the sand and gravel of the hill upon which the tank farm stood. He did not think the spill was of such significance that it should be reported.

It is interesting to note that Watt did not sound the tanks before he began pumping to determine the precise amount of fuel in them when he looked in with his flashlight. Watt also stated that when he first checked out the tanks, he thought them to be of 5,000-gallon capacity, but they were in fact only of 3,000-gallon capacity. On his barge at the time, Watt had a book listing these same tanks and showing their precise capacity as well as other pertinent information having to do with valve locations and filling procedures, but he did not refer to it. He was content he recalled from memory all the information he required. He made an interesting comment in his evidence, saying: "If I had known at the beginning they were 3,000-gallons tanks, I would not have overflowed them." Also, there were three other employees of the company on board the tug at the time, but no one was ever positioned on top of the tanks to keep watch, nor did the master of the tug supervise the discharge of fuel by Watt.

The next day, March 1st, 1975, Fisheries Officer Slater arrived in that area aboard a Fisheries Patrol Vessel about 0920 hours. He found a large oil slick extending from and covering about one-half the bay at the northern end of Kendrick Inlet, through Princessa Channel and extending about one-half way across Tahsis Inlet in an easterly direction. This officer could not see any oil around the wharf or foreshore installations at Stoltz's camp on this first visit, and he could not see any clear indication where the oil came from. He took samples of the oil and water and these

revealed from analysis that the oil on the water was a petroleum product of the intermediate range such as diesel fuel.

This officer and another Fisheries Officer came back to the area on March 3rd, 1975, to investigate the source of the oil spill. They found only two oil storage installations in the whole of Kendrick Inlet. One was the complex at Stoltz's camp, and the other was one large tank on a float at Plumper Harbour.

An inspection of the tank at Plumper Harbour showed no evidence of a spill, no oil between the logs of the float or the logs in the booming grounds and no evidence in the surrounding area.

At Stoltz's camp, however, the two men walked up the sand and gravel hill from the shore to the tank farm and found the ground surrounding the tank farm saturated with oil. While there was only an oily film on the undisturbed surface, a depression made in the surface with the heel of a boot collected a small pool of oil. The officers also saw a draw in the hill leading to the water's edge down which some oil was still running in spots and which showed evidence of having contained oil on some previous occasion. They followed this draw to the beach and saw it to be still weeping oil and that there was a connection between the oil from this draw and the large oil slick in Kendrick Inlet.

Although there was a possibility that the oil on the water of Kendrick Inlet came from some other source and as a result of some other spill, such a possibility was so remote that I have discarded it. I find as a fact that the oil slick on the waters of Kendrick Inlet described by Officer Slater came from the tanks in the tank farm at Stoltz's camp on the late night of February 28th 1975, or the early morning of March 1st, 1975. I find further that the oil spill into the said waters was the direct result of the overflow of the tanks during the filling operation being conducted at that place on that night by Watt on behalf of the accused company.

There is an admission by Counsel for the accused company that petroleum products of the intermediate range in water frequented by fish are deleterious to such fish. And I have the evidence of the Fisheries Officer, and I find as a fact that the water of Kendrick Inlet, Princessa Channel, Tahsis Inlet and Matchlee Bay are frequented by many varieties of fish. I find also that these waters are within the fishing zones of Canada.

Evidence given on behalf of the accused company established and I find that the accused company was careful in its training of Watt for his occupation as a bargeman. In accordance with the basic provisions of Part III of the *Oil Pollution Prevention Regulations* passed pursuant to the *Canada Shipping Act*, Watt was instructed in detail on the proper and safe methods of loading petroleum fuel onto the barge and discharging such fuel from it. He was also shown the details and idiosyncracies of each port of discharge by an experienced bargeman before he took on the operation of discharging petroleum fuel at such port himself. In addition, he had on board the barge detailed information about the tank capacities, and the pipe and valve connections of each such port of discharge.

In the course of such training, Watt was instructed by responsible officers of the accused company that before he undertook the filling of any tank with petroleum

products, he was to sound the tank with a metal tape weighted on the end, provided to him for such purpose, so as to establish with certainty the quantity of fuel in the tank before he commenced the filling operations. Watt was also directed to ensure that the deckhand from the tug remained at all times on top of the tank being filled, and that there be communications between them whether visual, vocal or by "walkie-talkie" radio so that Watt would be alerted when the filling of the tank was nearing the tank's capacity.

The manager of the accused company testified that Watt was instructed not to vary from any of the above safety procedures at any time. I accept this testimony as I do the testimony that the company maintains its vessels and ancillary equipment in good repair and that it has an excellent record for transporting petroleum products throughout the Coast of British Columbia without any previous spills. But there was no evidence before me from any source that as a bargeman in the delivery of petroleum products to isolated communities, the discharge procedures actually followed by Watt were supervised by any person or checked in any way.

The pertinent provisions of the *Fisheries Act* as amended are as follows:

33(2) *Subject to Subsection (4), no person shall deposit or permit the deposit of deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.*

(8) *In a prosecution for an offence under this section or Section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.* (My emphasis).

For the purpose of these proceedings, subsection (4) is not material.

I am satisfied that the offence set out in Section 33(2) of the *Fisheries Act* is one of strict liability. In reaching this conclusion I read with care the judgment of Ritchie J. in *The Queen v. Pierce Fisheries Ltd.*, [1970] 5 C.C.C. 193 (S.C.C.) and the judgment of Bull J.A. in *R. v. The Vessel "Aran"* (1973), 4 C.C.C. (2d) 179 (B.C.C.A.). While both of these cases dealt with different legislation, the wording of the legislative provisions is so similar as to make the decisions directly applicable. I am fortified in this conclusion by the decision of my brother judge, Arkell Prov. J. in *R. v. Churchill Copper Corporation Ltd.* (1972), 5 C.C.C. (2d) 319. But in both the *Pierce Fisheries* case and the *"Aran"* case, the legislation under consideration did not contain any provisions similar to the provisions of Section 33(8) of *Fisheries Act*, and it appears that this subsection was not argued or considered in the *Churchill Copper* case.

Bearing in mind the nature and purpose of the legislation and that section 33(2) creates an offence of strict liability, it is one thing when the act or acts complained of are committed by an individual in his own capacity and an entirely different thing

when the act or acts are committed by an employee or agent of an employer. It becomes more complicated still when the actual perpetrator is an employee or agent of a company, such as the accused.

If the offence created by Section 33(2) were not an offence of strict liability, that is, if the principle of *respondeat superior* did not apply, and if *mens rea* were a constituent element required to be proven by the prosecution - conviction could be virtually impossible in cases of employer-employee relationship. But by the same token, if there is no amelioration of the rule of strict liability, then persons who are innocent of any wrong doing would be convicted. It must have been with this problem in mind that Parliament enacted the provisions of subsection (8) of Section 33. The proviso in that subsection permits an employer to escape conviction if he "...establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission". This proviso recognizes the separateness of entity as between an employer and his employee, and that if an employer can meet the terms set out therein, he should not be held criminally liable for the acts or omissions of his employee.

But where a company, such as is the accused, is the employer it is difficult in many cases to determine which officer or director of the company represents the mind or will of the company such that his guilt constitutes guilt of the company, and which is only an employee or agent having a distinct entity from that of the company. In this regard, a quotation often referred to is contained in the judgment of Denning L.J. in *H.L. Bolten (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd.*, 1957 1 Q.B. 159 at p. 172:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors or managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

In my opinion one could readily determine the identity of the managers spoken of by Denning, L.J. by reference to the Articles of Association and Memorandum of the company and any valid delegation of the authority granted to any officer, director or manager by the Articles of Association and Memorandum of the company.

Nevertheless, I am satisfied that on the date of the spill of the diesel fuel and its entry into the waters of Kendrick Inlet, Watt was an employee of the accused company and not a director or manager of the company such that his acts became the acts of the company. Counsel for the Crown argued that since the offence was one of strict liability, all the Crown would have to prove were the acts constituting the offence and that Watt was an employee acting in the course and scope of his employment. I cannot accept this argument, for to do so would deny to the accused the possible defence set out in subsection (8) of Section 33.

But in order to succeed under the provisions of that subsection, the accused must establish not only that it did not know that the offence had been committed and did not consent to its commission, but also that it exercised all due diligence to prevent its commission. And both of the requirements resting on the accused to establish its defence are matters of fact to be determined from the evidence.

In regard to the first requirement, I am satisfied that the accused company did not know a spill had occurred until well after the occurrence. And not knowing of the spill, it could hardly have consented to it. But the matter of the exercise of all due diligence to prevent the spill is another matter.

The burden of "due diligence" placed on the accused company and any other transporter of petroleum products on and about the coastal waters of Canada must be commensurate with the seriousness of the injury which could be caused by the lack of such diligence. And it must surely now be evident to everyone who reads a newspaper that a spill of petroleum products on coastal waters, depending on the size of the spill, can cause immense injury and damage.

In this case, I find that the accused company had adequately trained the bargeman Watt and had set out a pattern of procedure to the standards required by the *Oil Pollution Prevention Regulations*. The accused company had also imposed requirements of Watt that, if met by him, would have maintained a high standard of care in the conduct of the business of the accused company. But due diligence as contemplated by Section 33(8) of the *Fisheries Act* requires more than the devising of proper and safe systems of carrying petroleum products in vessels on the coastal waters of Canada, and the loading of such products aboard and discharging such products from such vessels. That something more is the enforcement of adherence to a proper and safe system as far as it is practicable to do so.

Here, the accused company's operation consisted of a tug and a barge towed by that tug. The tug had a normal compliment of three, the master, deckhand and one other in addition to the bargeman who had some duties aboard the tug. But the bargeman's duties were mainly to operate the equipment of the fuel barge once it was secured to a wharf at the port of discharge. I do not understand why the master of the tug was not given the duty of supervising the discharge of fuel from the barge, or why he did not assume that duty or responsibility. It appears that the sole purpose for his being there was to effect delivery of diesel fuel to the tank farm at Stoltz's camp, so the added duty of supervision could surely have been included within the scope of his employment with the accused company. But if the master of the tug could not for some reason have performed this supervisory function, then someone else aboard that tug should have been affixed with this responsibility. There was no evidence before me of any supervision of Watt to ensure that he performed according to the standard of care required of him by the accused company. If the accused company makes less than a perfunctory effort, as in this case, to enforce the standards of performance of its bargemen, can it realistically expect a better performance than it received from Watt on this occasion?

Accordingly, I find that the accused company has not established that it exercised all due diligence to prevent the commission of the offence and I find the accused company guilty as charged on Count No. 1.

As to Count No. 2, the facts established in evidence are as follows:

After the loading of the oil tanks from the barge at Stoltz's camp, the tug took the barge under tow and headed out of Tahsis Inlet into and easterly along Muchalat Inlet to its head at Matchlee Bay. Enroute, the tug and barge stopped at a logging camp and loaded a small steel tug or boom boat aboard the deck of the barge. After loading this boom boat aboard the deck of the barge, the tug apparently experienced some mechanical problems, so it towed the barge to Matchlee Bay, anchored it there and left it unattended until a tug could arrive and take it in tow. Meanwhile, the tug headed for Vancouver for repairs.

On the deck of the barge, the boom boat was lying on a small raft of logs secured together as a bed for the boat. It was lying with a considerable list to its port side. There was diesel fuel inside the bullworks on the port side and this diesel fuel was escaping through a scupper onto the deck of the barge along which it ran into the waters of Matchlee Bay. Apparently the list of the boom boat caused diesel fuel to run from the starboard fuel tank into the port fuel tank and caused this tank to overflow into the bullworks.

Evidence before me established that the logger who owned the boom boat had it resting on the log raft, had used his own machinery to push the raft and boom boat up the ramp of the accused company's barge, and that the accused company's employees did nothing more than receive the raft bearing the boom boat aboard the barge.

Counsel for the accused argued that the employees of the accused had nothing to do with the escaping of the diesel fuel from the boom boat into the water. He argued that the fault was that of the logger and not the accused.

I cannot accept this argument. Once that cargo was loaded aboard the barge its movement on the waters off the coast of British Columbia became the sole responsibility of the accused company. It was the responsibility of the master of the tug to see that the cargo was secured in such a way that it did not permit the discharge of diesel fuel into the waters along which it was to be transported. If the cargo could not be so secured, it should not have been taken aboard the barge. I find this episode of the accused company's business to have been conducted very carelessly indeed and certainly not with due diligence to prevent the spill of the diesel fuel into the waters of Matchlee Bay. Accordingly, on this count also, I find the company guilty as charged.

I request that both Counsel arrange for a date with the Court Clerk for the matter of sentencing.

NORTH ARM TRANSPORTATION CO. LTD. v. REGINA

***British Columbia County Court, Stewart, Co. Ct.J., Nanaimo, B.C., July 14, 1977
and May 30, 1979 (New Trial)***

Environmental law -- Water pollution -- Oil spill -- Permitting the deposit of a deleterious substance in water frequented by fish -- Crown alleging deposit in water when charge should have been for depositing in a place where deleterious substance may enter water -- Crown alleging permitting deposit on a day when accused could not have had knowledge of it -- Appeal allowed on both counts -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2).

The accused appealed from its conviction on two charges of permitting the deposit of a deleterious substance in water frequented by fish, contrary to s. 33(2) of the Fisheries Act.

The appeals on both counts were allowed when the appeal was first heard on July 14, 1977. The Crown then appealed the decision in August, 1977. Before the appeal could be heard Supreme Court of Canada delivered judgment in the case of R. v. Sault Ste Marie. In view of the direct bearing of this case a consent order was made October 5, 1978 by the British Columbia Court of Appeal allowing the Crown's appeal and directing a new trial. The same County Court judge heard the new trial and rendered judgment May 30, 1979.

Held, on retrial, the crown's appeal on the first count was allowed. The defendant could not establish that it exercised all due diligence to prevent the spillage of oil when filling the oil tanks as required by subsection 33(8). The employee was negligent and the "paper order" issued by the defendant was not sufficient to raise the defence of due diligence.

Held, on retrial, the crown's appeal on the second count was dismissed. The consequences of a small spillage of fuel from the small boat carried on deck of the barge were relatively minor. The defendant took reasonable care in the circumstances.

D.R. Kier, for the Crown, at new trial
S.D. Stirling, for the Crown, at first trial
P.D. Lowry, for the Accused, Appellant

Stewart, C.C.J.:(May 30 1979)--The incidents involved in this appeal occurred in March of 1975, and in each the same petroleum barge of the appellant was involved. An information was filed containing two counts of pollution contrary to the provisions of the *Fisheries Act*. The appellant was convicted on both counts by Sarich, Provincial Court Judge. An appeal was launched which, in due course, was heard by me and allowed on each count. My reasons for judgment (July 14, 1977), which follow, tell most of the story to that point.

(July 14, 1977)--The regrettable delay in the delivery of these reasons is in accord with the general pace of these proceedings from their inception. The two offences, convictions for which are now under appeal, were alleged to have occurred

on the 1st and 2nd days of March, 1975. The information covering the same was sworn on the 28th of November, 1975. The hearing took place on the 4th of May, 1976, and judgment was delivered in the Provincial Court on the 16th of June, 1976. The appeal was heard by me on the 24th of March, 1977.

Count 2 was incorrectly described in the Notice of Appeal and counsel for the appellant applied to amend. As reference will be made to both counts I set them out as they appear in the information:

Count 1: On or about the 1st day of March, 1975, at or near Kendrick Inlet, in the County of Nanaimo in the Province of British Columbia, permit the deposit of a deleterious substance, a petroleum product, in water frequented by fish, to wit: KENDRICK INLET.

Count 2: On or about the 2nd day of March 1975, at or near Gold River, County of Nanaimo, Province of British Columbia, permit the - deposit of a deleterious substance, a petroleum product, in water containing fish, to wit: MATCHLEE BAY.

In the Notice of Appeal in describing Count 2 the following words were added:

"in contravention of Section 5 of the 'Oil Pollution Prevention Regulations' and did thereby commit an offence contrary to Section 33(2) of the 'Fisheries Act of Canada', Revised Statutes of Canada, Chapter F-14 and Amendments thereto."

Counsel for the Crown objected to the amendment and also submitted that the Notice of Appeal as to Count 2 was defective because of lack of certainty in describing the conviction and hence there was no jurisdiction in the Court. I reserved and proceeded with the hearing. I now refuse the application to amend but I have concluded that the words added to Count 2 in the Notice of Appeal are mere surplusage. In all the circumstances there can be no doubt as to the identification of the conviction appealed from and reasonable identification is the simple issue. Accordingly, this Court had jurisdiction to hear this appeal, the Notice of Appeal not being defective as alleged by the Crown.

All the evidence received at the trial in the Provincial Court was introduced through the transcript. Other evidence was also introduced in the form of some further testimony from one of the witnesses who gave evidence at the trial in the Provincial Court, some admissions of fact, and letters from two corporations engaged in the same sort of business as the appellant as to certain practices in the industry relevant to the issues in this appeal.

The appellant at relevant times operated a fleet of tugs and barges delivering petroleum products to coastal points in British Columbia and also moving machinery and equipment as required. As an indication of its volume of work it carried twenty-six million gallons of fuel from oil refineries to customers in the year 1975. Included in its fleet of barges was the fuel barge "North Arm Express".

This barge, under tow by one of the company's tugs, arrived at a camp in Kendrick Inlet, on the west coast of Vancouver Island, some time between ten and eleven o'clock in the evening on the 1st of March, 1975. The purpose of this visit was to deliver diesel fuel to tanks installed on shore for storage purposes. It was late, dark, and it seems that it was raining, although this is not too clear.

The barge man whose duty it was to carry out the unloading operation, with some assistance, hooked up his hoses to the pipes leading to the tanks. The tanks were located up an incline from the water, perhaps three to four hundred feet above the water. The incline seems to have been steep but still it was possible to walk straight up to the tanks and it is hard to determine from the evidence just how far the tanks actually were from the nearest water, but they must have been several hundred feet. The barge man proceeded up the hill on foot, equipped with a flashlight, to inspect the tanks of which there were approximately eight, six of which were for diesel oil. He looked in the tanks with his flashlight and ascertained to his satisfaction that one was half full and two were bone dry. He made no attempt to use a dipstick or to otherwise check to see whether the ones which appeared dry were in fact dry. He also from his visual inspection estimated that the two tanks which he had concluded were dry had a capacity of 5,000 gallons each. Having satisfied himself of the fuel requirements, he returned to his barge and commenced the pumping operation which was to take a matter of hours to complete. The barge man said he made checks every twenty minutes or half an hour to see that everything was alright. On the last of these inspection trips up the hill after an hour or two of pumping he observed from a considerable distance from the tanks that one was overflowing. There was some lighting available from a spotlight on the tug or the barge which enabled him to see the overflow before he actually arrived at the tank. He hastily closed down the operation. He checked the area physically to find out whether any of the fuel had run down to the water. As a result of this inspection and some calculations he made from his metre figures and from the size of the tanks which he now realized had only a capacity of 3,000 gallons, he satisfied himself that no oil had reached the water. He completed his delivery and that was the end of the matter, or so he must have thought.

However, the following morning a Fisheries' officer discovered an oil slick in the general area and there is no doubt whatever that the source of this slick was the overflow from the delivery of the previous night. The foregoing facts are relevant to Count 1.

The relevant sections of the *Fisheries Act* are as follows:

33(2) Subject subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

(8) In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

In my opinion Section 33(2) creates four different offences:

1. The deposit of a deleterious substance in water frequented by fish.
2. The deposit of such substance in any place where such deleterious substance or any other deleterious substance resulting from such deposit may enter any such water.
3. Permitting the deposit of a deleterious substance in water as aforesaid.
4. Permitting the deposit of a deleterious substance in any place as aforesaid.

It is in my opinion incumbent upon the Crown to lay the proper charge in the circumstances. And here I think it has failed to do so. It seems to me that the proper charge here would have been the permitting of a deposit of a deleterious substance in a place from which such substance or any other deleterious substance resulting may enter water frequented by fish. The Crown has failed to prove the deposit of the deleterious substance in question in water. It is quite true that the escape of such deleterious substance into water frequented by fish has been clearly established, but this is not the charge. Counsel for the Crown took the position that in such a situation as this the Crown has a choice of either charging a deposit in water or a deposit in a place from which the substance might reach the water, but I reject that argument. The charge must fit the circumstances and here it does not and accordingly the appeal as to Count 1 should be allowed. There is no need then to specify and comment on the obvious and aggravated acts of negligence of the bargeman leading to the spill, nor on the effect of subsection (8) of Section 33.

The circumstances giving rise to Count 2 involve the same barge. Prior to the delivery in Kendrick Inlet the barge had picked up as a deck load a small steel tug. It had been moved on to the deck of the barge by its owner in a cradle of some sort. It lay on the deck in that manner during 3 separate deliveries of oil, including the one above described and a subsequent one at Matchlee Bay. After the last delivery the tug towing the barge had trouble and was forced to return to Matchlee Bay where the barge was secured and left unattended to be picked up by another tug later. There was an interval of 24 hours from the time of loading the small vessel until the barge on which it rested was secured at Matchlee Bay. It is impossible on the evidence to fix the precise time the barge was left at that point.

On the 3rd of March, 1975, the Fisheries officer to whom I have referred discovered the barge unattended at Matchlee Bay. This was at dusk but he noticed oil in the water about the barge and upon investigating found oil spilled on the deck of the small vessel, signs of oil on the cradle or platform on which the small vessel rested, and further signs of oil on the deck of the barge from where some had clearly escaped to the water.

At 2.30 the following morning the appellant's tug dispatched to pick up the barge arrived. As far as I can gather from the evidence, which is not very clear on the point, the Fisheries officer was there at the time. In any event the master of this tug, an employee of the appellant at the time, testified that the Fisheries officer was present. He also said that he noted the small vessel which he said was laying on its port side. It was leaking oil according to this witness, coming out of a vent which he assumed was

for a fuel tank. He took steps immediately to prevent further escape of oil into the water. This is the first time that the appellant can be said to have had any knowledge of the presence of oil in or about the small vessel and from the time of acquiring that knowledge no further deposit of oil into the water was permitted.

There is no acceptable evidence to show the type of fuel used by the small vessel, or the number, type, location or size of the tank or tanks, or the quantity of fuel that had been contained at the time of loading. All that has really been established to my satisfaction is that at some time in excess of 24 hours after the small vessel had been loaded aboard the barge the signs of an oil escape from the small vessel into the water were observed. This was at dusk on the 3rd of March and I note that the date of the offence alleged in the information is the 2nd of March 1975. I cannot determine the time when oil first leaked from the small vessel, and accordingly I cannot say that the appellant or anyone in its employ had knowledge of the situation until 2.30 a.m. on the 4th of March 1975. As I read the authorities, knowledge of a situation or an event is essential before one can be said to permit the situation to continue or the event to occur. There simply is insufficient information on a number of important matters to enable me to conclude that the only reasonable interpretation of the evidence involves guilt. Count 2 has not been proved. The appeal is allowed.

May 30, 1979, judgment continued--The Crown appealed my decision in August, 1977. Before the appeal could be heard the Supreme Court of Canada delivered judgment in the case of *Regina v. City of Sault Ste. Marie* 21 N.R. 295 and this decision left no doubt that the Crown's appeal was well-founded. It is therefore not surprising that when the matter came before our Court of Appeal, a consent order was made allowing the appeal and directing a new trial. By such order the counts in the information were amended to read as follows:

1. On or about the 1st day of March 1975, at or near Kendrick Inlet, in the County of Nanaimo, in the Province of British Columbia, deposit a deleterious substance, a petroleum product, in a place, under conditions where such deleterious substance may enter water frequented by fish, to wit: KENDRICK INLET.
2. On or about the 2nd day of March 1975, at or near Gold River, County of Nanaimo, Province of British Columbia, deposit a deleterious substance, a petroleum product, in water frequented by fish, to wit: MATCHLEE BAY.

Counsel agreed that I should conduct the new trial, the evidence to be that contained in the appeal book prepared for the Court of Appeal which included a transcript of the proceedings at the first trial de novo which in turn included a transcript of the proceedings of the Provincial Court hearing and the subsequently agreed statement of facts. It is now necessary to consider count 1 in the light of s.33(8) of the *Fisheries Act*. The Crown has succeeded in establishing that it was an employee of the appellant, namely, the bargetender, Mr. Watt, who committed the offence of pollution contrary to s.33(2) so as I see it the accused is guilty unless it establishes that the offence was committed without its knowledge or consent and that it exercised all due diligence to prevent its commission as provided in ss(8). I don't think it can be argued that knowledge of the employee was knowledge of the appellant so the issue is narrowed as to whether the appellant has established that due diligence was exercised to prevent the commission of this offence.

It becomes necessary therefore to elaborate somewhat on the facts to ascertain just what the appellant did to prevent such an incident occurring.

The appellant Company has much experience in the moving of liquid petroleum products by barge in the coastal waters of B.C. I am satisfied that it fully appreciates the importance of avoiding any spillage. A barge such as the one involved here requires a crew of one and while he is not engaged on the barge, accommodation is provided for him in the towing vessel. While the bargeman may assist in some non-technical duties on the tug, his real assignment is to load and unload the barge as required. These are operations which may take some hours. Subject to a qualification which I will mention in a moment, the tug crew has no duties whatsoever with respect to the barge apart from taking it to its various destinations and securing it. The qualification I referred to is that there seems to be some kind of an understanding, and on the evidence I can describe it in no other way, that the deckhand should be available to the bargeman in the moving and connecting of hoses and to attend at the tanks during the unloading pumping operation to watch for and report to the bargeman any difficulty arising there. There is no evidence that the Master of the tug is instructed that the deckhand or another member of his crew must be a look-out for the bargeman during unloading operations.

While the bargeman was negligent in a number of respects there is no doubt that this spillage would have been prevented had a man been present on the tank as required by the appellant's instructions to its bargemen. Mr. Watt thought he was clever enough to handle the unloading himself and was reluctant to call on the deckhand because it was a dark and rainy night, which I think in itself would be an added reason to have a look-out, even without instructions. This simple and unsophisticated requirement of having a relatively untrained person as a look-out was all that was required to prevent this incident. There can be no assurance against human failure or disobedience but the evidence does not satisfy me that the appellant issued more than a "paper order" that two men be engaged in this operation. I accept the proposition that the tug Master cannot have any responsibility for the unloading operations but such officer could most certainly be responsible to assign the deckhand or someone else to assist the bargeman. In cases where the barge is to be left and the tug dispatched on other duty, it would be simple, it seems to me, to arrange with the customer that a look-out must be provided before delivery could be effected. If that is impractical or impossible then obviously the unloading operation must wait until a look-out is produced from some source. I am prepared to accept as a fact that the appellant trained its bargemen sufficiently, that it chose a suitable candidate for the job from a point of view of possessing sufficient intelligence, but the appellant has failed to satisfy me that it took sufficient steps to make reasonably sure that two persons would be on the job during unloading operations. It did not exercise due diligence to prevent this offence occurring and its conviction on count 1 must be upheld.

Turning now to count 2, I emphasize once again that those involved in the carriage or delivery of liquid petroleum products are fixed with a heavy responsibility to prevent pollution. And the reason is, of course, the possible disastrous consequence of any significant spillage into water frequented by fish and other marine life. The consequences of a maximum spillage from the fuel tank of the small Dozer boat carried as a deck load on the appellant's barge could hardly be classified as

catastrophic or calamitous. I think this must be kept in mind when considering the appellant's obligations with respect to that small Dozer boat.

I have little to add to the comments I have already made to my decision after the first trial de novo and I see no reason to alter any of my comments. In my opinion s.33(8) does not apply to the circumstances of this count. I don't think the Crown has proved that the appellant committed the prohibited act. It was proved no more than that a very considerable time after the Dozer boat was installed on the deck of the barge, oil was seen to be escaping from the Dozer boat across the deck of the barge into the water. The only reasonable inference I can draw from the evidence is that the spillage occurred while the barge was unattended and it cannot be ascertained from the evidence whether the spillage was caused by some further listing of the small vessel in its cradle, or, perhaps, even by the tampering of a stranger. But assuming that proof of the escape of the fuel oil in the manner alleged is indeed sufficient to put the onus on the accused to prove that it took reasonable care to prevent such discharge, I am of the opinion there is little the appellant could have done in the circumstances. There is no evidence to show that the Dozer vessel was insecure in its cradle and there was no evidence to indicate that there was any risk of any escape of oil after the expiration of a substantial period of time after the loading.

On the evidence I don't see how the appellant could have prevented this discharge short of leaving a watchman with the unattended barge. In my opinion in the circumstances this would have been an impractical and too onerous an obligation to impose on the appellant. Accordingly I am of the opinion once again that the appeal from the conviction on this count should be allowed and the conviction quashed.

REGINA v. IRVING PULP AND PAPER LIMITED (No. 1)

New Brunswick Provincial Court, George, J., Saint John, N.B., October 1, 1976

Environmental law -- Water Pollution -- Pulp Mill Wastes -- Procedure for measuring toxicity to fish prescribed by regulations -- Newer toxicity test used by government authorities instead of prescribed procedure -- Accused acquitted -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(11); Pulp and Paper Effluent Regulations, SOR/71-578.

The accused was charged with depositing a deleterious substance, pulp mill waste, into the Saint John River on April 6, 1976. *Regulations* which applied to the company prescribed in Schedule D a specific procedure for determining the toxicity of such waste to fish. However, government authorities conducted the toxicity test which was introduced in evidence according to a newer procedure rather than according to the method set out in the *Regulations*.

Held, the accused was acquitted. Since the procedure followed was not the one prescribed by the *Regulations*, the Crown had failed to show that the substance deposited was deleterious within the meaning of s. 3(2) of the *Regulations* and s. 33(11) of the *Act*.

Hubert McKenna, for the Crown
Donald M. Gillis, Q.C., for the Accused

George, J.:--On the 16th day of June, 1976, Irving Pulp and Paper Company was charged before another Judge of the Provincial Court that on or about the 6th day of April, A.D., 1976, did deposit a deleterious substance namely water containing pulp mill waste in water, contrary to the provisions of section 33(2) of the *Fisheries Act* Chapter F-14, Revised Statutes of Canada.

The information was amended on August 24th before this Court and re-sworn to include the words, "water frequented by fish--".

It is not necessary for the purposes of this Judgement to recount the facts. The factual situation is not challenged by either Counsel for the Crown or Counsel for the accused corporation. The questions to be answered by this Court are questions of law. They are not technical but substantive which go to the heart of the matter. They are the following: Counsel for the Crown, Mr. Hubert McKenna, submits that Irving Pulp and Paper Limited fall within the strict arrest of Section 33(2) of the *Fisheries Act*, Chapter F-14, Revised Statutes of Canada, and that the definition of deleterious substance falls within and is under the control of Section 33(11) of the *Fisheries Act*. He further rests his case on the supposition that the regulations enacted pursuant to Sections 33 and 34 of the *Fisheries Act* respecting deleterious substances in the form of effluent from pulp and paper mills are irrelevant and not applicable to the charge before the Court. Mr. Donald M. Gillis, Q.C., puts his case for the *Irving Pulp and Paper Limited* upon two grounds: 1. That the Crown is restrained from proceeding against the accused corporation by virtue of Section 33(4) of the *Fisheries Act*. 2. That the regulations under the number P.C. 1971-2281 published in the Canada

Gazette on the 24th day of the 11th month, 1971, are mandatory and must be conformed with as an absolute to the present charge.

The germain sections of the *Fisheries Act* in the opinion of this Court are as follows: "3. (1) Subsection 33(2) of the said Act is repealed and the following substituted therefor:

"(2) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water."

"(4) Subsection (2) does not apply (a) to the deposit of waste of a type, in a quantity and under conditions authorized by regulations made by the Governor in Council under any other Act in any waters with respect to which those regulations are applicable, or in any place under any conditions where such waste or any other waste that results from the deposit of such waste may enter any such waters; or (b) to the deposit of a deleterious substance of a type, in a quantity and under conditions authorized by any regulations made by the Governor in Council under this Act for the purposes of this subsection in any water with respect to which those regulations are applicable, or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water."

The Court has extracted the following excerpts from the regulations which it considers to bear directly upon the matter in question.

"2. (1) In these Regulations, 'expanded mill' means any existing mill in which, after the coming into force of these Regulations, equipment has been installed that increases the production of the mill by ten per cent or more;"

"3. (1) For the purposes of paragraphs (c) and (d) of the definition "deleterious substance" in subsection 33(11) of the Act, the following are hereby prescribed as deleterious substances:

- (a) total suspended solids;*
- (b) oxygen-demanding decomposable organic matter produced as waste from a mill;*
- (c) toxic wastes deposited by a mill.*
- (2) For the purposes of paragraph (1)(c) "toxic waste" is any waste that is found to be toxic when tested in the manner described in Schedule D."*

"6. These Regulations shall apply to each mill of the class described in Column 1 of an item of Schedule F on and after the day set out in Column II of that item."

SCHEDULE F
DATE OF APPLICATION

Column I Class of Mills	Column II Date
1. New Mills	November 24, 1971
2. Expanded Mills	November 24, 1971
3. Altered Mills	November 24, 1971
4. Existing Mills	-

Under cross-examination by Mr. Gillis the following testimony was elicited from William Roy Parker, a Crown witness:

"Mr. Gillis: Well, Mr. Parker, if this Irving Mill was actually an expanded mill by definition, wouldn't you then be obliged to follow Schedule D in the Regulations?

Mr. Parker: Yes, to my knowledge if it was an expanded mill then it would come under the Regulations, then we would do the tests as outlined in the Regulations.

Mr. Gillis: But you didn't do those tests, did you?

Mr. Parker: No."

Mr. George O'Brien taking the stand on behalf of Irving Pulp and Paper Limited testified as follows:

"Mr. Gillis: Now in the period from 1971, let's say to 1974, were you employed by the Irving Pulp and Paper Mill Limited?"

"Mr. O'Brien: Yes, I was.

Mr. Gillis: What was your position?

Mr. O'Brien: Co-ordinator of mill expansion and Mill Manager.

Mr. Gillis: Now was the expansion completed and equipment installed that would increase the production in November 1971?

Mr. O'Brien: It was.

Mr. Gillis: How much did this increase the production approximately?

Mr. O'Brien: In the vicinity of 50 per cent."

In arriving at its conclusion the Court has not chosen the least objectionable as contrasted with the most undesirable. The Court is fully aware of the magnitude and the implications involved in the decision it is about to pronounce. There is just no return to Paradise by the back door or by any type of legerdemain. It is the opinion of this Court that the Court cannot convict Irving Pulp and Paper Limited as charged since the Crown has failed to bring the accused corporation within the *Fisheries Act* and the aforementioned Regulations. Therefore a verdict of not guilty is entered.

REGINA v. IRVING PULP AND PAPER LTD. (No. 2)

New Brunswick Provincial Court, Harrigan, C.J., Saint John, N.B., April 15, 1977

Environmental Law -- Water Pollution -- Sentencing -- Pulp Mill Wastes -- Inadequate cooperation by corporate accused -- Thirty-five hundred dollar fine -- No order to refrain -- Fisheries Act, R.S.C. 1970, c. F-14; ss. 33(2), 33(7), 33(11); Pulp and Paper Effluent Regulations, SOR/71-578.

The accused plead guilty to one count of depositing a deleterious substance in water frequented by fish. The substance in question was waste produced during the normal operation of the company's pulp mill.

Held, the appropriate fine was thirty-five hundred dollars. Fisheries officers had attempted for eight years to persuade the company to reduce pollution at its plant, but received only limited cooperation from the accused's officers and employees. Nonetheless, no order to refrain from committing further offences was issued pursuant to subsection 33(7), as the Court found that the wording of this provision did not allow it to make an order.

H.P. McKenna, for the Crown.

D.M. Gillis, Q.C., for the Accused.

Harrigan, C.J.:--The Irving Pulp and Paper Limited. This is the information of Philip Hennebury, who says that he has reasonable and probable grounds to believe and does believe that the Irving Pulp and Paper Limited, a body corporate, carrying on business in Saint John, the County of Saint John, the Province of New Brunswick, on or about the sixth of January, 1977, did deposit a deleterious substance, namely water containing toxic pulp mill waste in the water of the Saint John River, Saint John, New Brunswick, contrary to the provisions of Section 33, subsection 2 of the *Fisheries Act*, being Chapter F-14 of the Revised Statutes of Canada 1970 and amendments thereto.

Mr. McKenna: Your Honour, the Crown wishes to withdraw that charge.

The Court: Any objection, Mr. Gillis?

Mr. Gillis: No, Your Honour.

The Court: On Crown's motion to withdraw, no objection from defence, the information is withdrawn, it is dismissed. There is a further information here of Philip Hennebury a fishery officer, who says that the Irving Pulp and Paper Limited, a body corporate, carrying on business at Saint John, in the County of Saint John, in the Province of New Brunswick, on or about the seventh day of January, 1977, did deposit a deleterious substance, namely water containing toxic pulp mill waste in the water of the Saint John River, at Saint John, New

Brunswick, contrary to the provisions of Section 33, subsection 2 of the *Fisheries Act*, being Chapter F-14, of the Revised Statutes of Canada, 1970 and amendments thereto. Yes, Mr. Gillis?

Mr. Gillis: The plea to that charge is guilty, Your Honour, and I believe the Crown, and probably the defendant wishes to call a witness on the question of sentence.

The Court: Thank you, on the Company's plea of guilty the finding is guilty. Mr. McKenna?

Mr. McKenna: Yes, Your Honour, on the question of sentence the Crown would ask to call Richard Row?

The Court: Do you want him under oath?

Mr. McKenna: No, Your Honour, I don't think it would be necessary.

The Court: All right, let's have him come up here then. Do you want him under oath, Mr. Gillis.

Mr. Gillis: No.

Mr. McKenna: Would you relate your name and occupation?

Mr. Row: My name is Richard Row, and I am an engineer, I work with the Department of Fisheries and Environment Canada.

Mr. McKenna: And what is your occupation within the Department of Fisheries.

Mr. Row: I'm an environmental engineer and I am manager of the Technical Services Branch with the Environmental Protection Service.

Mr. McKenna: And where is your office located?

Mr. Row: It is located in Halifax.

Mr. McKenna: Now, sir, are you familiar with the charge before the Court?

Mr. Row: Yes, I am.

Mr. McKenna: The background concerning it?

Mr. Row: That's correct, yes.

Mr. McKenna: And would you relate to the Court the background of this matter?

Mr. Row: Can I refer to my notes?

Mr. McKenna: Yes.

Mr. Row:

We in 1969 began negotiations with the Irving Pulp and Paper Mill to try and effect a waste treatment at the Pulp Mill in Saint John. The reason we began in 1969, was that the Company at that time announced a rather significant expansion in their production, their planned expansion was going from three hundred tons per day of kraft pulp up to eight hundred tons per day, which would bring the total production for the mill to in the vicinity of eleven hundred tons a day, when you include the roughly three hundred tons a day of sulphite pulp. We had been taking measurements at that time and had found that the effluent was extremely toxic to fish, and when I say toxic, we have a test whereby we place fish in the effluent and we use different dilutions of effluent, in other words we take a hundred percent effluent, we take another tank and we dilute it to fifty percent effluent with water, and we place fish in various dilutions, and we found that that effluent killed fish down to the range where only two parts out of a hundred was pulp mill effluent, at that time, in 1969, after one or two meetings the company came forth with plans to put in a biological treatment system. A biological treatment system consists of really a hole in the ground in which bacteria, either organic material in the pulp mill effluent, and in doing so, they take out the materials that are harmful to fish. We, after several meetings found that the plans that the company presented were acceptable, we felt quite confident that they would make the effluent acceptable for discharge to the river. However, in May of 1971, the company indicated that because of discussions they had had with the City of Saint John, they felt that it would be more economical to go into a treatment system with the City of Saint John, and the municipal effluents would be treated at the same time and in the same treatment system as the pulp mill effluents. We thought that this was a good idea because the City of Saint John, on the West Side did not have any waste treatment at that time and this provided an opportunity to get both of these pollution sources cleaned up. So we entered into discussions with the company at that time, to look at the plans for a suitable waste treatment system. These discussions carried on for a considerable period of time and included other representatives, or other departments of both the Federal and Provincial Government, people like representatives from the Department of Regional and Economic Expansion were involved as well for the funding of such a joint treatment system. Finally, in 1973, the company was asked because of the delays that we were experiencing to submit plans for a treatment system. In March, of 1973, the company indicated that they had grown skeptical of the joint treatment system with the City of Saint John, primarily because of economic constraints, and they were now looking at what they called an in-plant system. The first two systems as I mentioned were biological treatment systems, and the treatment would have been done outside of the actual pulping facilities at the Mill. The third system, the in-plant system would be accomplished by various changes in the process. We were skeptical at the time that the plans were presented for the in-plant system. We asked the company, we

told the company this and then we gave them what we call a compliance date --

Mr. McKenna: A compliance what?

Mr. Row: A compliance date. What that is is we said we don't think that you are going to meet our objectives with this in-plant approach, but this is the third go around we have had for waste treatment, so we want a treatment system installed by December 31st, 1975, we don't care what you do, but we want our requirements met by that date. We went back--well, let me go back a little bit, when we came to the end of December, 1975, the company indicated that it would be impossible to meet that deadline, because of various problems that they had experienced, particularly with the construction in Saint John, and the shortage of pipefitters was one of the problems mentioned. So an extension to this deadline was granted to, I believe the end of March, 1976. We sent a team of samplers down to the mill in April of 1976 and collected samples for five days, and this case is now before the Courts. The Company indicated that there were other things that were going to be done at the mill, we were still skeptical that these would achieve the requirements that we had in mind, and we sent another sampling team back this year, and picked up additional samples on two days, and these are the samples that we are talking about now. We found that the effluent was extremely toxic to fish and in fact there had been little change since we started measuring the effluent in 1969.

Mr. McKenna: That is eight years ago?

Mr. Row: That is correct, yes.

Mr. McKenna: Now would you interpret to the Court, or relate to the Court, the analysis of the samples that were taken for January 7th, this year.

Mr. Row: Yes, I would. On January 7th, we placed rainbow trout in effluent collected from the Irving Pulp Mill, and the trout died in less than half an hour, we also placed Atlantic salmon in the same effluent and again death occurred in less than half an hour. Now with the proper treatment system, both Atlantic Salmon and rainbow trout are capable of surviving for more than ninety-six hours, in a properly treated effluent. So that shows you the difference between what a good treatment system can do and what we found at the Irving Pulp Mill.

Mr. McKenna: Now the treatment system they have now was obviously not working on January 7th.

Mr. Row: That is correct, not working according to our requirements.

Mr. McKenna: Now, can you tell me how long in your, in the Department's opinion, it would take to have the treatment centre there come up to your requirements, how long would it take the defendant company?

- Mr. Row: Well, we believe, after going over the experiences we've had with other kraft mills in New Brunswick, that we feel that a proper treatment system could be constructed and put into operation in approximately a year and a half. There are various steps that would have to take place before this year and a half, before this period, for instance we would think that it would be acceptable for the company to tell us in conceptual terms what they are going to do to properly treat their waste, we would think that it would take perhaps another three months to come up with detailed plans showing in very detailed fashion what this treatment system is all about, and we would expect that in another month or two that construction could take place to build this treatment system, and we would expect that in a year and a half that system would be finished and in operation and producing an effluent in which fish could live for more than ninety-six hours.
- Mr. McKenna: Now they live less than a half an hour?
- Mr. Row: That is correct.
- Mr. McKenna: You said that in 1969, that the situation hasn't changed from the analysis from then?
- Mr. Row: We have collected several samples from the Mill, at times the fish --I think the greatest survival we've measured, and I would have to go over my notes and check in detail, but the greatest figure that I remember is the survival time of roughly forty-eight hours, and this was done on a trial basis, where effluent was simulated. But in our trips down to the mill to collect effluent from the sewer pipe, the toxicity or death occurs to the fish in very short periods of time, less than half an hour is certainly not out of line, with what we found in the past.
- Mr. McKenna: What about the compliance for the company of the other regulations and requirements, that they must be fulfilled, like monitoring and anything else, were you getting co-operation in that respect?
- Mr. Row: We have not received data from the company as far as the monitoring goes, but I must admit that we haven't formally asked the company to submit this information on a routine basis, we are concerned however that the last time we checked that the necessary flow measuring information and the sampling equipment was not installed. This is the main reason that we did not ask for the information, we felt that it didn't exist.
- Mr. McKenna: Now, well, to enforce the regulations, or whatever, if I understand correctly, there is an offence every day?
- Mr. Row: That is correct. Each day constitutes a separate offence.
- Mr. McKenna: It is your estimate that it would take a year and a half to correct this?

Mr. Row: That is correct, yes.

Mr. McKenna: Thank you very much.

CROSS-EXAMINATION BY MR. GILLIS:

Mr. Gillis: Mr. Row, is it?

Mr. Row: Mr. Row.

Mr. Gillis: Row, I'm sorry, were these, you told us what the results were on the tests on the seventh?

Mr. Row: Right.

Mr. Gillis: How did they compare with the tests that were made on the sixth?

Mr. Row: The tests on the sixth, the L.T. 50, for rainbow trout on the sixth -- I should explain, the L.T. 50 is the time fifty percent of the fish survive up to this time. So it was forty-eight, between forty-eight and seventy hours on January sixth, in other words, fifty percent of the fish died between forty-eight and seventy hours.

Mr. Gillis: Well, I wanted to ask you this, the tests were much better on the sixth than on the seventh?

Mr. Row: That is correct, I perhaps should add though that our people, when they were down there on the sixth observed that the pulp mill was -- the effluent was cleaner, and it was quite different than they had ever noticed before, on the seventh, the effluent was consistent with past observations, and this was a visual observation.

Mr. Gillis: Do you know that the mill had problems on the seventh?

Mr. Row: I'm not aware myself that they had problems on the seventh.

Mr. Gillis: But that could account for the difference, would you agree?

Mr. Row: All I can relate is that the observations made on the seventh were not significantly different from past observations.

Mr. Gillis: Well, I'm suggesting that they had problems on the seventh, that they didn't have on the sixth, that is all I'm suggesting.

Mr. Row: Well, that could well be.

Mr. Gillis: Now, am I not correct under a regulation there are three different, what do I say, classifications under deleterious substances, there is the suspended solids, and the B.O.D. and the toxicity, is that correct?

Mr. Row: That is correct.

- Mr. Gillis: This company have met their -- have met the regulations in respect to suspended solids, have they not?
- Mr. Row: Well, this is something that we were unable to measure, because suspended solids are based on production, now when we go into the mill, we take a sample of the effluent, and we do an analysis in the lab, and they tell us what the concentration of suspended solids are on a part per million basis, in other words in a concentration. You have to multiply this by the flow, to arrive at what the suspended solids discharges are as they are interpreted in the regulations. We did not have the information on the flows because the flow metering information was not available.
- Mr. Gillis: Well, do I understand your answer is you don't know if they have met these conditions on suspended solids or not?
- Mr. Row: We don't know, that is correct.
- Mr. Gillis: But you are not complaining about that?
- Mr. Row: Well, we aren't complaining about it because we couldn't measure it.
- Mr. Gillis: I see, well, what about the B.O.D.?
- Mr. Row: We have exactly the same problem with the B.O.D. as we do with the suspended solids.
- Mr. Gillis: Are you aware that the company in recent years has spent a great amount of money in trying to meet these regulations?
- Mr. Row: We are aware that a great deal of money has been spent at the pulp mill for various reasons, and we are aware that there have been changes made in the mill which has cut down on the amount of - or the volume of waste discharge to the river. But I think it is rather debatable to say that all of the money has been spent on pollution control.
- Mr. Gillis: Have you had an opportunity to review a report of Mr. W.J. Wilson of Atlantic Analytical Services, made in February of this year?
- Mr. Row: I am not aware of the report myself.
- Mr. Gillis: You're not?
- Mr. Row: No, I'm not.
- Mr. Gillis: Have you heard of it?
- Mr. Row: No, I haven't.

- Mr. Gillis: Well, I wanted to read you then perhaps a few portions to see if you agree, it's talking about the water quality at this mill.
- Mr. Row: Is this of the effluent or in the river?
- Mr. Gillis: Well, let me read, it says the requirement for the Irving Pulp Mill is that their aqueous discharges must not contain more than fifty thousand pounds of B.O.D. per day, and sixteen thousand pounds suspended solids per day, excluding sulphite mill B.O.D. Excluding the sulphite mill contribution the Irving Pulp Mill is presently sewerage sixty-two thousand six hundred pounds of B.O.D., which is a dramatic improvement over former levels, and has been achieved by internal modifications, such as spill recovery, counter-current washing, at a cost estimated by environment officials to be in the vicinity of three to four million dollars, would you agree to that?
- Mr. Row: Well, I can't agree or disagree, because as I said we had a great deal of difficulty because the flow measuring equipment wasn't in, but I would like to comment on the B.O.D., if I may.
- Mr. Gillis: Well, just let me go on a minute. The current level of suspended solids is eighty-two thousand five hundred pounds per day, well above the permitted level and the Irving Pulp Mill is required to install control equipment before October 15th 1978, to meet the requirements by December 31, 1978. The Mill has already changed to dry-barking which has eliminated the problem of suspended solids and B.O.D. in bark or effluent. The Province estimates that approximately three point nine million was spent on this, could you agree or disagree with this statement.
- Mr. Row: I couldn't agree with the cost figure, but I could certainly agree that the company has gone to dry-barking. It has been an improvement, yes. I note that the solids are still quite a bit above the Federal requirements.
- Mr. Gillis: It says also, it concludes here, there is only one mill in the Province which is in compliance with the regulations on water quality, Ste. Anne Nackawic, is that correct?
- Mr. Row: No, that is not correct.
- Mr. Gillis: What others are?
- Mr. Row: The Miramichi Timber Resources in Newcastle.
- Mr. Gillis: I see, Consolidated Bathurst?
- Mr. Row: No, Consolidated Bathurst certainly isn't.

- Mr. Gillis: It says other mills have clarifiers and treatment plants under construction, or in operation, although not always in compliance with the regulations, is that true?
- Mr. Row: I really don't know, when we go around to sample, we have found that the effluent at the Mills that have treatment systems are meeting our requirements.
- Mr. Gillis: Are you familiar with a report of T.W. Beak, Consultants who made a study of this?
- Mr. Row: I'm not sure which report you are referring to.
- Mr. Gillis: Well, this was one, did you never see a report where they recommended that Irving Pulp and Paper install facilities to control foam and wood chips which were discharged to the river?
- Mr. Row: I believe that that was one of the initial reports that was done by Beak for the company. And I believe in the same report they also recommended biological treatment, this was in 1969, if that is the correct report.
- Mr. Gillis: It is not a fact that the effluent which is discharged in the river, receives very rapid dispersion?
- Mr. Row: I believe that would probably be a correct statement, yes.
- Mr. Gillis: So, this mill is unique in this respect, in respect to its location and that regard.
- Mr. Row: Well, it is unique that it is the only mill on the Reversing Falls.
- Mr. Gillis: Yes, and near the mouth of the River.
- Mr. Row: Yes, like MacMillan Rothesay, yes.
- Mr. Gillis: That is all.
- The Court: Thank you. Is that everything, Mr. McKenna?
- Mr. McKenna: That's everything, Your Honour.
- The Court: Yes, Mr. Gillis?
- Mr. Gillis: I'd like to call Mr. R.J. Kneeland. Would you state your name?
- Mr. Kneeland: Roland Joseph Kneeland.
- Mr. Gillis: And what is your occupation?

- Mr. Knelland: Manager of the Irving Pulp and Paper Company Limited, Saint John.
- Mr. Gillis: And what are your qualifications?
- Mr. Kneeland: I am a graduate Chemical Engineer, with an associate degree in pulp and paper and some twenty-one years in the business of manufacturing paper and pulp.
- Mr. Gillis: Now, are you familiar with these classifications of deleterious substances under the regulations of the Fisheries Act?
- Mr. Kneeland: In a general way, I am, yes.
- Mr. Gillis: And am I correct that there are three classifications?
- Mr. Kneeland: That is correct.
- Mr. Gillis: Suspended solids, B.O.D. and toxic waste, is that correct?
- Mr. Kneeland: That is correct.
- Mr. Gillis: Now, how is the mill now, with respect to the first one, let's say the suspended solids?
- Mr. Kneeland: We feel that except for upset conditions which did occur on the seventh of January, the mill is in compliance on B.O.D. and suspended solids.
- Mr. Gillis: And would you tell us about these upset conditions on the seventh, why the seventh was not similar to the sixth of January?
- Mr. Kneeland: We had a problem in the mill that required that the sulphite mill be down and part of the kraft mill was not operating, nor were the paper machines, the pulp machines. We produced on that day four hundred and forty seven tons of pulp, the day of the sixth, the day before we produced nine hundred and fourteen tons. It is the type of day when everything goes wrong and the mill was upset as concerns flows or control. That happens on occasion.
- Mr. Gillis: And that would affect the results?
- Mr. Kneeland: Yes, sir, that would.
- Mr. Gillis: Now then, speaking of toxicity, I gather that is the complaint now, what is the program of the company been to come within compliance of the regulations, would you tell us?
- Mr. Kneeland: I'm not familiar in detail with the occurrences prior to January, 1974, when I came to Saint John, but at time we concluded, as indicated earlier by Mr. Row, that in-plant containment was the way for us to go, for several reasons. I'd like to come back to that Mr. Gillis,

because it is rather unique. At about that point some very serious far-reaching work was being done in the industry, at the University of Toronto, which indicated that the future of a mill like ours should be looked at from the standpoint of a closed system, without being technical, I would say to you that that simply means you re-use the water as many times as you can before you discharge it. The man who did this work, along with his associates has since been awarded several science prizes in the industry, and that process today is in general operation at Great Lakes Paper, at the Lakehead, and is the first in the industry and the foremost, because of that work, it had been determined at Irving Pulp that we should follow a similar path, that required an expenditure of nearly three quarters of a million dollars, to more than double our capacity to manufacture chlorine dioxide, such that we could substitute for the chlorine, a less deleterious substance. We have worked jointly with the Province in this matter, and although there have been some doubts expressed the effect of this, we feel, has been very good. Except for the circumstances with the sulphite mill, and some of the things we cannot control, we still hope and anticipate that this approach will in fact put us in compliance in the area of toxicity.

Mr. Gillis: I think you said you wanted to come back to reasons later, what did you wish to say in that respect?

Mr. Kneeland: I would like to mention the approach we are taking to B.O.D. and suspended solids. The approach that I favoured for many years, and is now being held up as the practice of the future is a very simple one. Keep your waste in the mill, keep your material in the mill, don't let it out, and if you don't let it out, it doesn't contaminate. But it does one more very nice thing for the environment, it means that you are utilizing your trees to a better extent, and it means that that material which in a bio-degradable system is thrown away for land fill is now made into a useful product. It is however, a unique approach and requires a good deal of money and time and particularly education on the part of your operators. It is not easily accomplished, however, we feel proud of the fact that we have now accomplished that in terms of B.O.D. and suspended solids.

Mr. Gillis: And how much, would you say approximately has been spent in attempting to reach these objectives so far?

Mr. Kneeland: It is difficult to give you a figure that is accurate to the penny, Mr. Gillis, however, and this would include the work done to change from wet-barking to dry-barking. It is approximately eight and a half million dollars.

Mr. Gillis: So far?

Mr. Kneeland: To date.

Mr. Gillis: And has your program been completed as yet?

- Mr. Kneeland: No sir, we have several minor aspects of the program on-going with the requirement of approximately another half a million dollars.
- Mr. Gillis: And when that is completed, can you express an opinion with respect to compliance with the matter to toxicity?
- Mr. Kneeland: I would reiterate again, we hope and we anticipate that this will put us in compliance.
- Mr. Gillis: How is your program then, with respect to other mills, is it the same approach, or have you approached it differently?
- Mr. Kneeland: No sir, the mill that I mentioned, the Great Lakes Paper Company, is really the only other mill in this part of Canada that has taken this approach. Most of the mills in the U.S. utilize the bio-degradable system and the system referred to earlier by Mr. Row, which is separation by settling, and we are, I think, in eastern Canada, unique in our approach.
- Mr. Gillis: How does your mill compare with respect to compliance with other similar mills, in the Atlantic Provinces, or in the Province of New Brunswick?
- Mr. Kneeland: You make those judgments on the basis of the people you discuss the matter with, however, our understanding is there is only one mill in New Brunswick in compliance on water quality standards, and that same mill has very serious air quality standards. We know of no other mill in New Brunswick, perhaps one in Nova Scotia which is in compliance on water quality.
- Mr. Gillis: You are familiar with this report of Mr. Wilson, of Atlantic Analytical Services Limited, made a little more than a month ago. Do you have any comments with respect to that, Mr. Kneeland?
- Mr. Kneeland: I would only say that the report was made at the request of Councillor T.J. Higgins, who is chairman of the Pollution Control Committee, for the City of Saint John, in order that the City fathers could determine what Irving Pulp's position was in relation to water and air quality standards and pollution. The general comments I would make are certainly public in their nature, and are in this report as well as in a prior newspaper article, however, I would quote here a statement by Doctor Jim Young who is an air quality expert with the Province, when he says that Irving Pulp and Paper Company is the foremost in air quality control and standards in the Province.
- Mr. Gillis: That is air quality?
- Mr. Kneeland: That's air quality.
- Mr. Gillis: Just before you go on, how much has the Company spent to achieve those results, approximately?

- Mr. Kneeland: Including the extra money spent on the boiler for control of air borne pollutants, mainly from the recovery boiler, somewhat more than three million dollars. I would quote again from Doctor Young, this is again on air quality, that the electrostatic precipitator at the Irving Pulp Mill is the best in the Province when operating effectively and removes ninety-nine point three percent of the particulate matter passing through it. And in conclusion a general statement from Doctor Young says that the Pulp Mill is the best controlled mill in the Province. In terms of water quality he says that the only other mill in the Province which is in compliance with the regulations on water quality is Ste. Anne Nackawic.
- Mr. Gillis: What do you say Mr. Kneeland, as to the location of a mill, with respect to dispersion of the effluents?
- Mr. Kneeland: It is a rather unique location, because we are in the centre of the City, and for that reason, we are concerned greatly about the air quality problems. But it is also unique in that the discharges to the river have many times been tested and it has been indicated by so-called experts, namely T.W. Beak, that there can be found to be no damage done in the river itself, when sampled above, at, or below the mill.
- Mr. Gillis: Now, Mr. Kneeland, just for general information what is the number of employees at the mill.
- Mr. Kneeland: Approximately at this moment, six hundred and thirty-eight, or six hundred and thirty-nine persons employed at the mill.
- Mr. Gillis: That's all.

CROSS-EXAMINATION BY MR. MCKENNA:

- Mr. McKenna: Who is Doctor Young, Mr. McKneeland?
- Mr. Kneeland: He is a member of the air quality group for the Province of New Brunswick.
- Mr. McKenna: Who employs him?
- Mr. Kneeland: The Province of New Brunswick, the exact terminology of the Department escapes me, but it is the air quality group, I believe, for the Province.
- Mr. McKenna: You realize the charge here has to do with toxic pulp mill waste?
- Mr. Kneeland: Yes sir.
- Mr. McKenna: It has nothing to do with B.O.D. or suspended solids?
- Mr. Kneeland: Yes sir, but that has been discussed here in some length.

- Mr. McKenna: Well, it is not being alleged, anything to do with suspended solids or B.O.D.?
- Mr. Kneeland: That is correct.
- Mr. McKenna: Would you agree with the first witness, Mr. Kneeland, that the toxicity of the effluents from that mill has not changed since 1969?
- Mr. Kneeland: No, I would not agree with that. As I understand you have to understand.
- Mr. McKenna: You were only there since '74?
- Mr. Kneeland: That's right, January, '74, I do not know exactly what the conditions were in 1969, however knowing that wet-barking was a part of the procedure, and that many tons of bark per day, and chips, and other material which contribute to a toxic nature of effluent were then present, and are not now present with the new barking facility, one would have to deduce that it has to be less.
- Mr. McKenna: Well, would you agree that the Department has been in touch with the Irving Pulp and Paper Company since 1969, regarding toxicity?
- Mr. Kneeland: That is my understanding, and you know, if I may make a comment on that, we have very little contact with the Federal people, we do work with the Provincial people, and the only times that I personally, other than visits to Halifax, have seen the Federal people, is when they arrive unannounced at our gate with two or three trucks, wanting to be let in to take samples.
- Mr. McKenna: Well, now would you agree that under the regulations that you are to monitor?
- Mr. Kneeland: That is correct, and we do monitor.
- Mr. McKenna: I understand that there was a call made and there aren't records kept?
- Mr. Kneeland: That is not my understanding, if you have some information I don't have, there was a request for information which I will forward to the people, the request was made for our information for the sixth and seventh and that was given over, was it not?
- Mr. McKenna: For the sixth and seventh, yes.
- Mr. Kneeland: And I would also argue with the point of measurement, you know there are many ways to measure the height of a man or the flow through a weir, other than by automatic measurement, if the reference is made to automatic measurement I would agree with Mr. Row. If the reference is made to measurement I would not agree with Mr. Row. Because we do in fact measure flow. On that

particular day, the particular time in reference our calculations determined that there were fifteen million gallons going through that particular effluent point.

Mr. McKenna: Well, the problem, do you know the solution to the problem?

Mr. Kneeland: I believe the solution to the problem is the direction we are heading in, yes sir.

Mr. McKenna: How many years is that going to take?

Mr. Kneeland: That is a very difficult question to answer.

Mr. McKenna: Could it be done within a year and a half, as Mr. Row said?

Mr. Kneeland: I would have to say, Mr. McKenna, that if we do not arrive at a solution -- that we should arrive at a solution, a final determinate on the merits of ClO₂ substitution and containment before the end of the year and a half, yes sir.

Mr. McKenna: And it would then fulfill the requirements under the regulations?

Mr. Kneeland: We certainly anticipate and hope that they will.

Mr. McKenna: In a year and a half?

Mr. Kneeland: I suppose that is possible. By the same token there are other deleterious materials going to the sewers there from the sulphite mill, which are not under control as you know.

Mr. McKenna: That is all I have, Your Honour.

Mr. Gillis: That's all.

The Court: Anything further Mr. Gillis, any witnesses?

Mr. Gillis: No, no witnesses, Your Honour.

The Court: Any argument?

Mr. McKenna: Your Honour, just referring to the amended section of the Code, Section 33, subsection -- excuse me -- 33 subsection 5, which provides for the penalty, which says a fine not exceeding five thousand dollars for each offence, we are dealing with one offence. Under subsection 7, Your Honour, it talks about, the Court may in addition to any punishment, impose, order to refrain from committing any further such offence, or to cease to carry on any activity specified in the order. It is accepted by the Crown that an order under 7 might be -- well it is not asked for that an order that stops -- because it is just physically impossible.

The Court: Suppose you did ask for it, the way that that particular subsection 7 is worded.

Mr. McKenna: Yes, Your Honour.

The Court: Let's look at it for a moment, where a person is convicted of an offence under this section, the Court may in addition to any punishment it may impose, order that person to refrain from committing any further such offence. You are presupposing that this Court can find a Company or a person guilty of a similar offence of which it's just found him guilty, and then hold that person or corporation in contempt. I don't make any sense out of it. It doesn't make sense. I'd very much like to be able to issue some sort of an order to restrain the pulp mill from pumping out the effluent that apparently is being pumped out there. And with all respect to Doctor Young, I believe he must reside elsewhere. But how can I function with the wording of that particular subsection 7. Whether you are asking for it or not, it is my discretion whether to use it.

Mr. McKenna: Oh, yes, Your Honour.

The Court: How could I function, if I wanted to, which I'd very much like to, quite frankly. I think you'd better refer the wording of that subsection back to your principal in Ottawa and tell them to take a hard look at it, as far as draftsmanship is concerned, I don't think it is a workable section.

Mr. McKenna: Right, Your Honour. So with regard to the fine Your Honour, under subsection 5, it is totally within the discretion of the Court, Your Honour, it is submitted on behalf of the Crown that this has been a continuing nuisance to the -- now mind you it is a large mill but this idea of being able to pollute the waters for the sake of, even though it is nine hundred and sixty jobs, and we are only dealing --

The Court: Six hundred and thirty-eight jobs.

Mr. McKenna: Six hundred and thirty-eight, I'm sorry, it still doesn't justify the polluting of our water and presumably there is other pollutants going on, but we are not dealing with those. It is a growing thing, the purpose of the penalty there is in hopes that such activities could be restrained by fines. It is the hope of the Crown that the penalty imposed by the Court under that fine, would help to restrain any future violations of the section. Knowing evidence that it would take a year and a half, even in the opinion of the Crown to totally correct this matter. There are certain things that have to be done in order that it be completed in a year and a half. It is just the hope, that the Crown has been attempting apparently, the Department, since 1969 to get something to happen there, and it hasn't happened, and I would just ask the Court that in determining the money penalty that well it give all of those factors consideration.

The Court: Yes, Mr. Gillis?

Mr. Gillis: I guess all I can say, please Your Honour, it is in your discretion of course, I would ask you to take into account though the facts, or the evidence given by the witnesses, and especially Mr. Kneeland.

The Court: First of all Mr. McKenna, I believe that Parliament intended something by drafting subsection 7, it intended to do something, and the something that they intended to do was to try to force a company or a person to immediately cease, desist, from putting toxic substances into the waters and what have you. But here I have evidence out of the mouth of your own witness, that indicates to me that even with every best effort put forth by the mill, this situation can't be corrected for a year and a half. Now, that being the case then, I say to myself, can you then reasonably lay another charge within the next year and a half, and hope to get a conviction. On the one hand you are not seriously arguing that I should try to apply subsection 7, and on the other hand, by what your own witness has said you have practically barred yourself from successfully prosecuting a further charge for every day that mill might be polluting the waters, because all the company has to do is get up and say we are making every honest effort to correct it, as a result of being chastised on April 15th, 1977 by some sort of a fine. So where do we stand. I have to say quite frankly, gentlemen, I'm probably not completely sold on all the fancy studies that are made by the so-called experts, particularly in one, the person of Doctor Young, who tells me that there is no air pollution from that mill over there. In any event, you are trying to work within the framework of an Act, Mr. McKenna, that leaves you with a considerable struggle on your hands, and by the same token the spirit of the Act, I think, is excellent. Frankly I don't think I can let this moment pass without making an observation that serious attempts have been made by the Fisheries Officers since '69 to correct the situation over there, then I would have to say to myself that not very serious attempts have been made by the mill personnel to cooperate in correcting the situation. For this offence the company is fined the sum of thirty-five hundred dollars, in default of payment thereof distress will issue, levy on the goods and chattels of the said company. How many days will the company need to pay the fine, Mr. Gillis? I'll give the company a week and then you can work out the arrangements. Time one week.

REGINA v. CANADIAN PACIFIC LIMITED

British Columbia Provincial Court, McCarthy, J., Vancouver, B.C., February 11 and 28, 1977

Information -- Duplicity -- Depositing and permitting deposit of deleterious substance in water frequented by fish -- Statute creating two separate offences -- Crown charging both but in different counts -- Information not void for duplicity -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2); Criminal Code, s. 724(1)(b).

Evidence -- Witnesses -- Compellability and privilege against self-incrimination -- Employee of accused corporation compellable to testify as Crown witness -- No privilege.

Environmental law -- Water pollution -- Depositing and permitting deposit of oil in water frequented by fish -- Release of oil from locomotive into pollution control system resulting in escape of oil into nearby watercourse -- Accused claiming defence of all due diligence -- Evidence showing insufficient maintenance of antiquated pollution control system -- Accused convicted -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(8).

The accused was charged with depositing and permitting the deposit of a deleterious substance in water frequented by fish after oil from the accused's railway maintenance yards escaped into a nearby harbour. The evidence showed that while a portion of the oil in question could be attributed to an unforeseeable failure in one of the accused's locomotive, the remainder had been released on account of inadequate maintenance of the pollution control system.

Held, the accused was convicted. Although the accused had made a considerable effort to clean up the spill, it was still liable on account of its prior negligent conduct, and therefore had not brought itself within the defence of all due diligence.

Environmental law -- Water pollution -- Sentence -- Factors to be considered -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

Kienapple v. The Queen (1975), 15 C.C.C. (2d) 524; *R. v. Judge of the General Sessions of the Peace for the County of York, Ex parte Corning Glass Works of Canada Ltd.*, [1970], 3 C.C.C. 204; *Canada Tungsten Mining Corporation v. The Queen*, unreported, N.W.T.S.C., March 5, 1976; *Sweet v. Parsley*, [1970] A.C. 132; *referred to*.

H.J. Wruck, for the Crown

Ms. P. Maughan, for the Accused

McCarthy, J.:—(Ruling on Preliminary Objections, Feb. 11, 1977) I reserved until today on a number of issues. First, I wish to thank both counsel for their very able submissions, both oral and written. The latter especially has made my task considerably less difficult, more interesting but less difficult.

The first issue I reserved upon, without prejudice to the defence, was the motion by way of preliminary objection to quash the Information for duplicity. The section under which the Crown has proceeded, s.33(2) *Fisheries Act* R.S.C. c.119 reads as follows:

Subject to subsection (4) no person shall deposit or permit the deposit of any deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

On consideration of this subsection I have come to the conclusion that it contemplates two separate offences: (1) depositing a deleterious substance into waters frequented by fish, and (2) depositing a deleterious substance at a place under conditions where such substance may enter water frequented by fish. The depositing itself of a deleterious substance is not a wrongful act; the wrongfulness of the act is depositing such a substance in water frequented by fish or, alternatively, depositing such a substance at a place under conditions where such a substance may enter water frequented by fish. A defendant can do one without doing the other. If the Crown had combined these two complaints in one count then it would clearly have been bad for duplicity. A count in an Information cannot charge an offence in the alternative, and the reason is that the defendant is entitled to know with precision with what it (here a company) is being charged and of what it is being convicted. Here the Crown has charged the defendant in the alternative but in different counts, which it is entitled to do. See s. 724(1)(b) of the Canadian Criminal Code. Now the facts in this case may reveal that both counts arise out of the same matter, and if so it would be open to the defendant, of course, to move for the dismissal of one count on the basis of the principle enunciated in the case of *R. v. Kienapple* (1974), 15 C.C.C. 524. The Crown is not precluded, however, for the reasons I have just given, from laying two counts and in the form in which they appear on the Information before me. The motion to quash is dismissed.

The second issue to be resolved is whether Mr. Peter Green, an employee of the defendant company is, in law, a compellable witness for the Crown. In my considered opinion he is. He is a witness who happens to be a servant of the corporate defendant and he can testify, like any other witness, as to all relevant facts within his knowledge. He does not speak "for" the company. His status *vis a vis* the defendant company does not, in my view, affect his compellability to testify even though his evidence might tend to incriminate his employer. The privilege against self-incrimination is, of course, available to Mr. Green as a witness upon his testifying, but it does not extend to the defendant whose employee is called by the Crown in this criminal trial. See: *R. v. Judge of the General Sessions of the Peace for the County of York, Ex Parte Corning Glass Works of Canada Ltd.*, [1970] 3 C.C.C. 204.

Finally, the third issue, I find the statement made by an unidentified person to Mr. Elliot inadmissible as it lacks that sufficient nexus to the defendant to be relevant, at least at this juncture.

McCarthy, J.:- (Reasons for Judgment, February 28, 1977) The defendant is charged with two complaints under section 33(2) of the *Fisheries Act* R.S.C. 1970, c. F-14 (as amended). They are:

Count 1: Canadian Pacific Limited at the City of Vancouver, in the Province of British Columbia, on or about the 30th day of October 1975, did unlawfully deposit a deleterious substance in a place under conditions where such deleterious substance may enter waters frequented by fish, contrary to the form of the statute in such case made and provided;

Count 2: Canadian Pacific Limited at the City of Vancouver, in the Province of British Columbia, on or about the 30th day of October, 1975, did unlawfully deposit a deleterious substance in waters frequented by fish, contrary to the form of the statute in such case made and provided.

The evidence led by the Crown reveals, and I find as fact, that the defendant owns and operates a railway maintenance yard situate and being on the north side of False Creek in the City of Vancouver. Waste material from the yard, and in particular from a Roundhouse located thereon is received by a series of drains which lead to an oil separator that in turn discharges into False Creek through a sewer outfall.

On or about October 30th, 1975 in excess of one hundred gallons of lubricating oil was discharged into False Creek through this system. False Creek, I find, is water frequented by fish and it is agreed that lubricating oil is a deleterious substance.

The admitted evidence on behalf of the defendant is that on the night of October 29th and 30th, 1975 a locomotive had completed a maintenance check and was idling outside the Roundhouse when a gasket blew causing sixty gallons of lubricating oil to leak into a drain leading to the separator and a consequent discharge into False Creek. The maintenance foreman, a Mr. Silver, who was on duty, had never seen in his long experience, or heard of, such an occurrence.

The defendant relies on sub-section (8) of Section 33 of the *Fisheries Act* and submits that on the facts it has satisfied the "unless" portion of this sub-section. This sub-section reads as follows:

(8) In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

Counsel for the defendant submits that the "separator was put into use to clean up every day predictable oil spills of a routine nature" and its installation was not intended to anticipate every conceivable eventuality such as occurred on the night and day in question. It is further submitted that the oil separator had been reliable in the past, was regularly maintained and not found to be wanting. The deposit of oil was caused by a latent defect in a company locomotive, it was caused without the consent or knowledge of the defendant and that the company exercised "all due diligence" to prevent the commission of the offence. For the most part I respectfully disagree.

The oil separator was built in 1914 and in the opinion of Mr. John Watkins, Chief Operations Protection Officer of Environment Canada, it was inadequate to cope with today's pollution problems. Proper maintenance of this separator in his view required the removal of the oil daily or at least weekly. This was not done. Indeed and on the contrary the evidence is that it was cleaned, the separator, at best on three to four weekly intervals, more often monthly or longer. The oil capacity in this separator was two hundred and fifty gallons. The discharge from the locomotive was only sixty gallons and the discharge into False Creek was over one hundred gallons. One can but conclude from this that there must have been a considerable amount of oil in the separator prior to October 30th, 1975 which ought to have been removed. In other words, if there had only been sixty gallons discharged into the separator and it had been properly maintained as claimed, then by its very structure and capacity it ought to have remained in the separator, ready for removal, and not have been, as it was, discharged into False Creek. Further, the separator had no overflow tank or automatic devices to prevent discharge of oil into the outfall in the event of other than small oil flows.

Mr. Green, Assistant Divisional Engineer of the defendant company, in conversation with Mr. Watkins some three days before the incident occurred, said that the separator was "inadequate to cope with todays flows of oil." Mr. Green agreed that a new oil separator to replace the existing one would help but it was not part of the company's pollution abatement proposals that were to be submitted to Environment Canada. Mr. Green has testified in this trial and his evidence is, in part, less incriminating than what he said to Mr. Watkins. This is understandable. However, where there is any variance between what he said to Mr. Watkins and what he has said to me, I am inclined to accept as more accurate the former. There is evidence that there had been previous incidents of oil spillage into False Creek, one such incident prompted boat owners of the local marina under the leadership of one, Stanley Burke, to prepare a petition and present it to whom they considered the person responsible for action.

The action of the defendant subsequent to October 30th, 1975 including the more frequent cleaning of the old oil separator, the one in question, and more significantly the installation of a new separator alongside it can permit of the inference that the defendant tacitly acknowledged that the system employed before was inadequate for the existing needs.

Now there is no argument that the defendant intended or hence consented to the unprecedented escape of oil from the locomotive as previously described. The Crown's position is, as I understand it, that this spillage constituted but a percentage of the total discharge or deposit present in the oil separator, and that there has been no evidence adduced here sufficient to establish that the defendant exercised all due diligence to prevent the oil separator from getting into the condition which resulted in the oil spill into False Creek as proven.

I am unconvinced on the facts before me that the defendant has shown here that it did not know nor consent to the depositing of oil (excepting the sixty gallons from the locomotive) into False Creek. Even if I were convinced, to avoid liability the defendant must couple lack of consent or knowledge with, and I'm now quoting from the judgment of Mr. Justice Morrow of the Supreme Court of the Northwest Territories in the case of *Canada Tungston Mining Corp. Ltd. v. The Queen*,

unreported, March 5, 1976, the defendant must couple lack of consent or knowledge with:

A behavior or consciousness which in effect shows it was not blind to the consequences of the possibility as well as the consequent danger of a leakage such as is found in the present case.

I cite *Sweet v. Parsley* 1970 A.C. 132, as Judge Morrow did, where Lord Diplock states at page 163:

Where penal provisions are of general application to the conduct of ordinary citizens in the course of their everyday life, the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject matter of a statute is the regulation of a particular activity involving potential danger to public health, safety, or morals, in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose, by penal sentences, a higher duty of care on those who choose to participate and to place on them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfill the ordinary common law duty of care.

The cleaning up operation by the employees of the defendant company, while praiseworthy in itself, does not affect liability. It occurred after the event. "Prevention" not "correction" is the word used in Sec. 33(8).

The responsibility for the proper installation, repair and maintenance, especially maintenance, of the oil separator is the defendants. The defendant has, in my considered opinion, fallen short of showing any sufficient effort which could be termed due "diligence to prevent". I am satisfied, on the whole of the evidence, that the Crown has proven its case beyond a reasonable doubt with respect to both counts. I am equally satisfied that this defendant has not brought itself under Sec. 33(8) to gain an acquittal, and I accordingly find the defendant guilty of both charges.

Now, what does counsel have to say with respect to the matter of sentence or convicting of both counts. I have in mind the principle of *Kienapple*.

Mr. Wruck: Yes, Your Honour, the Crown has no desire of convicting the defendant of both counts because of the principle in *Kienapple*. Really, the Crown is only interested in successfully prosecuting the accused for one count.

The Court: Well, you agree then that the two complaints originate from the same cause or matter and hence the application of that principle enunciated in that case applies here?

Mr. Wruck: Yes, I agree completely with Your Honour.

The Court: I take it you don't take any exception to that, ma'am?

Ms. Maughan: No, Your Honour.

McCarthy, J.,--(Remarks at Sentence, February 18, 1977) In passing sentence in this case -- let me see the Information, please -- and by the way sentence is going to be passed on Count Two.

In passing sentence I am going to take into account the efforts of the defendant's employees immediately after the spill was detected, and also I am going to take into account the consequent construction of a new oil separator. I am not entirely satisfied as to that separator's full use and effect, nor am I unaware of the fact that it was constructed, or completed rather, some six months thereafter, but in any event it shows an indication of concern of the defendant in that respect.

Now, I must also bear in mind the deterrent effect of a conviction and the resultant consequences in the present type of offence. The defendant is one of the largest corporate entities in this country. Its very magnitude and size makes it important that the penalty not be so small as to invite further breaches. The defendant has several previous convictions under this Act or similar enactments and has shown some reluctance to implement, has been less than responsive, to proposals for better pollution abatement in False Creek.

The place of occurrence is not insignificant here. False Creek in 1975, the year of the commission of this offence, provided as it does now facilities for pleasure craft, and plans had been laid at that time for the construction of low and medium rental accommodation, that is, on the south side of False Creek. Such users and others, the public as a whole, are entitled to the many benefits and pleasures of the area, including the marine life that exists both therein and thereunder. The defendant must accept its corporate responsibility and do so seriously when maintaining an operation such as this in a location so central to the heart of Canada's third largest city.

By Section 33(5) provision is made for a maximum fine of five thousand dollars.

To adequately meet the requirements of deterrence and protection it is my opinion that there should be a fine here, and I do so impose a fine, of four thousand dollars.

Now with respect to Count number one, Mr. Prosecutor, is it one that I should dismiss or invite the Crown to enter a stay? I don't think it should be left in limbo.

Mr. Wruck: No, Your Honour. The Crown would direct the Clerk of the Court to enter a stay of proceedings on Count One.

REGINA v. GREAT CANADIAN OIL SANDS LTD.

Alberta Provincial Judges' Court, Aime, J., Fort McMurray, February 23, 1977

Environmental law -- Water pollution -- Deposit of deleterious substance in water frequented by fish -- Acute lethality tests performed in laboratory using species of fish not present in water in question -- No other evidence of harmful effects -- Deleterious nature of deposits not proven -- Accused acquitted -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(11).

The accused operated an oil sands extraction plant near the Athabasca River. It was charged with permitting the deposit of a deleterious substance in water frequented by fish after government tests showed that two samples of seepage in the area of its operations were acutely lethal to fish under laboratory conditions. The first sample consisted of seepage which flowed out of the dyke surrounding the accused's tailings disposal area. This effluent flowed into a nearby swamp and could not be directly traced to the river. However, seepage also flowed from a pipe which projected from the riverbank in the same vicinity, and a sample of the surface water of the river collected immediately where this seepage emptied into it was also found to be acutely lethal under laboratory conditions.

Held, the charge should be dismissed. The Crown's evidence of acute lethality arose from tests on species of fish which were either only marginally present in the waters in question or totally absent, and otherwise disclosed no discernible harmful effects on the river. Accordingly, the deleterious nature of the material deposited was not proven and the accused was therefore entitled to be acquitted.

D.W. Kilgour, for the Crown

D.R. Thomas, for the Accused

Aime, J.: (Orally)--We are now dealing with the judgment of the charge under the *Fisheries Act* against the Great Canadian Oil Sands Company Limited of Fort McMurray. The charge in the Information dealing with the complaint is that Great Canadian Oil Sands Limited, a body corporate registered under the laws of the Province of Alberta, on or about the 12th day of July, 1976 near Fort McMurray in the Province of Alberta did permit the deposit of a deleterious substance in water frequented by fish, namely, the Athabasca River contrary to the provisions of Subsection 33(2) of the *Fisheries Act* as amended to date.

The statute, we are dealing with, Section 33 subsection 2, no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish, or any place under any conditions for such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water. The definition under the Act, Section 33 (11) any substance that if added to any water would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered deleterious to fish or to the use by man of fish that frequent that water; and, subsection (b) has practically the same thing "that frequent that water."

The Crown therefore must prove first, the identity of a person or registered company, two, that on July the 12th, 1976 they did permit a deposit, three that there was a deleterious substance, and four, in water frequented by fish; and this being a summary conviction procedure it must be beyond a reasonable doubt. It is of strict liability which means - doesn't - intent is not an ingredient, excuse, or negligence a defence.

We now go to the evidence. The evidence is that Great Canadian Oil Sands is a corporation in the Province of Alberta, and we're dealing with the material time of July the 12th, on or about. The Crown led several expert witnesses, and dealing with Mr. William Lake he along with two others took samples from what was described as the dyke filter pipe, and also from the inner surface - interface samples.

The Crown led the evidence of the laboratory tests before the evidence of the taking of the samples, and it was a bit difficult to just relate the two. However, Mr. William Lake, Peter Mildner and William Cary together went to the area between the dyke and the settling pond of the Great Canadian Oil Sands' operation and the Athabasca River. They took water samples from the so-called dyke filter and a sample from the interface, so-called, and also from 10 feet upstream from the interface and 40 yards downstream.

Mr. Lake conducted bio-assay tests using the Stickleback, and from the interface it is my understanding from the evidence that three of the ten died. Mr. Beckett also conducted tests with the use of rainbow trout, and the dyke samples, five died within 72 hours, and at the interface five died of the five within the 96 hours. None - there was no mortality of the downstream nor of the upstream.

Mr. Dave Berry, research programmer, who had worked on the Athabasca River during the greater part of last summer between June and September, on a 80-mile stretch of the river from Fort McMurray to the Firebag River sampling fish and that he found at least 20 species. He found no rainbow trout. He found five Stickleback which was out of over 3000 fish that he had netted, and he observed that there was no predication of the ecological environment on the Athabasca River.

Mr. Galbraith and Mr. Spagnut did not give expert evidence but they did say that they fished on the river, and especially Mr. Spagnut who said that he fished within the area and has done so for a considerable length of time and did not find that there was any deterioration to the ecology of that particular area. Mr. Perehinec of the Great Canadian Oil Sands gave evidence that there was considerable rain water along the dyke, that fertilizer had been used, and I think I can say at this moment that it really doesn't matter whether the effluent we're concerned with comes from inside the dyke or outside the dyke as long as the company are responsible for its control.

I therefore find that GCOS or Great Canadian Oil Sands is a corporation within the Province of Alberta, that they did have control of the dyke at the interface area, the effluent from the dyke filter went into a ditch, and there's only an inference that there was a connection between that particular location and the interface area. So, it really cannot be considered evidence as going into the river as it is only near. The effluent from the interface area was under the control of the Great Canadian Oil Sands and that this effluent did flow into the Athabasca River and that it was deleterious to fish that were subjected to tests in the laboratories.

I also find that the Athabasca River is frequented by fish, and this leaves the matter of a deleterious substance, was it or was it not to the Athabasca River.

The Crown has made an analogy of a speeding car, with 31 miles an hour being one mile over the speed limit; that it is an offence regardless of the degree; however, I feel that he left out another element that is necessary, and that is not only was there speeding but it was dangerous to the public, if you want to use that analogy.

I think the purpose of the *Fisheries Act* is to protect the ecology environment of the river from pollution by industries or any persons that may be involved. We all agree I think that this should be controlled for the public interest.

I also would like to say that when we're dealing with a matter of pollution you have motor boats on the river, you have the bitumen in the Athabasca River, you have birds on the river, even fish themselves would pollute the water, so there's no such thing as pure water.

So, we are dealing with a matter of degree, and we're dealing with getting back to what is a deleterious substance. Any substance that if added to any water that would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered deleterious to fish or to the use by man of fish that frequents that water.

To be a deleterious substance it must affect the fish in the water that we're dealing with which is the Athabasca River and not elsewhere. I find that there is absolutely no evidence of any effect on the ecology or the fish in the Athabasca River at, near, or downstream from the Great Canadian Oil Sands' plant on or about the 12th day of July, 1976, neither before or after. Therefore, I dismiss the charge against the company.

REGINA v. GREAT CANADIAN OIL SANDS LIMITED

The District Court of Alberta, Edmonton, Alberta, McClung, J., January 10, 1978

Environmental law -- Permitting the deposit of a deleterious substance in water frequented by fish -- No evidence of adverse effects on river in question -- Acute lethality tests performed using fish species not present in water affected -- Deleterious nature of deposit not proven -- Appeal dismissed -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(11).

The accused was charged with permitting the deposit of a deleterious substance in the Athabasca River after seepages collected in the vicinity of its operations were shown to be acutely lethal to fish under laboratory conditions. The charge was dismissed in Provincial Court on the grounds that the Crown had failed to prove that the material deposited was deleterious within the meaning of the statutory definition.

Held, the appeal should be dismissed. There was no evidence of any harmful effects on the river, nor was there any evidence of deleterious substances in the fluids in question. Moreover, the Crown's tests had utilized species of fish not present in the Athabasca River or only very rarely so, and these data were therefore insufficient to prove that the seepages in question were deleterious.

R. v. British Columbia Forest Products Ltd., unreported, B.C. Co. Ct., June 17, 1976; *refd to*.

D.W. Kilgour, for the Crown, Appellant

D.R.G. Thomas, and *T.A. McCrum*, for the Accused, Respondent

McClung, J. -- Great Canadian Oil Sands Ltd. was charged that (it) on or about the 12th day of July, 1976 near Fort McMurray in the Province of Alberta, did permit the deposit of a deleterious substance in water frequented by fish, namely, the Athabasca River, contrary to the provisions of subsection 33(2) of the *Fisheries Act* (Canada) as amended to date. The Crown appeals the company's acquittal following trial in the Provincial Court.

The company's operations include a tar sand mine and processing plant near Fort McMurray situated near the Athabasca River. The processing plant separates bitumen from tar sand by means of a sophisticated hot water process. The bitumen is then refined to synthetic crude oil and the by-products, sand, water and clay are diverted to a large tailings pond near the extraction plant. A large dyke encircles the tailings pond and some of the by-product sand is employed in elevating the height of the dyke to contain increasing water levels. Some water is withdrawn from the pond and recycled for use at the plant. The clay settles slowly within the pond and in the opinion of William Cary, the Environmental Conservation Co-ordinator of the company, who was called as a Crown witness, forms an impermeable barrier between the water found within and the sand dyke surrounding which prevents any seepage.

Suspicious that effluents were reaching the Athabasca River, environmental authorities took water samples at four locations between the tailings pond and the

nearby Athabasca River on July 12, 1976 and thereafter. These samples are described as follows:

- (a) The dyke drainage sample - this sample was taken from two of some 72 drainage pipes which had been apparently installed to regulate water levels within the dyke itself to insure its stability. Notably, this discharge was never monitored to determine if it eventually entered the Athabasca River. Its progress after leaving the pipes was described as "meandering" and without definite channel.
- (b) The interface sample - a pipe extending about three feet from the river bank discharged liquid into the river, the level of which was about 18 to 24 inches below the pipe itself. The sample was not taken solely from the fluid discharged by the pipe but from the river immediately below. The Environmental Officer understood that the pipe emitted liquid initially collected from the upper third of the dyke although it appeared to connect with what was described as a little collection pond which in turn connected with some ditches near the base of the dyke.
- (c) The downstream samples - water was collected from the Athabasca River nearby but downstream from the interface sample point.
- (d) The upstream samples - water was collected from the Athabasca River nearby but upstream from the interface sample point.

These four samples were then taken to Edmonton where in laboratory conditions two species of fish, Rainbow Trout and Brook Stickleback, were introduced into each of the samples for specified periods of time. Some of the fish expired in the dyke drainage and interface samples but no mortality was reported in the upstream or downstream samples.

In my view, a review of the evidence supports the learned Provincial Judge's disposition of this charge. The evidence indicates that:

- (1) The river itself displayed no visible evidence of any adverse effects as a result of any aspect of Great Canadian's operation.
- (2) There was no evidence of any disruption of the aquatic or biological systems present in the river.
- (3) While there was some evidence that sodium hydroxide, naphthenic acid and bitumen itself reached the tailings pond as by-products of the extraction process there was no evidence that they or any harmful substance was discharged from the tailings pond during or after the settling process into the river through the discharge pipes investigated by the environmental authorities. No analysis of the questioned fluids was proven in evidence. An *in extremis* attempt to prove that ammoniated fertilizer used by the company in the cultivation of grass and shrubbery during area reclamation had washed into the river during recent heavy rains was made by Crown Counsel during his cross-examination of defence witnesses. The learned Provincial Judge made no finding in this regard but it is clear from the

reasoning in *Regina v. Wynnychuk* (1962), 37 W.W.R. (N.S.) 381 that such a finding could not support a verdict adverse to the respondent.

- (4) The dyke drainage sample fluid was not proved to have reached the Athabasca River or have been "deposited" within it.
- (5) The interface sample fluids, apart from their questionable source, were not proved "deleterious" having regard to the fact that the Athabasca River itself was either inhospitable or instinctively objectionable to Brook Stickleback and Rainbow Trout because of their absence, or at least rarity, in its waters.
- (6) No proper evidence was led indicating the chemical composition of the alleged effluents from which the learned Provincial Judge could find toxicity to fish by themselves or in conjunction with other substances.
- (7) No proper evidence was led establishing that any toxic substance associated with the company's operation reached the river which was not present in any event when regard is had to the fact that the river or its tributaries flow through outcroppings of tar sand releasing into its course bitumen iridescents or natural oil slicks.
- (8) There was no evidence indicating the pathology of the dead Rainbow Trout and Brook Stickleback.
- (9) No tests whatever appear to have been carried out to demonstrate any undesirable effect arising from the alleged effluents upon aquatic life measurably innate to the Athabasca River. Consequently there was no evidence that any species that "frequented" the river was deleteriously affected. The use of the verb "frequent" in s. 33 of the *Fisheries Act* (Canada) is not without significance. The Shorter English Oxford Dictionary provides the following definitions:

'frequent - to visit often; to resort to habitually; to use habitually; ... to resort to and unto; to associate with; to be often in and about; to crowd, fill.'

Neither the Brook Stickleback or the Rainbow Trout used in the laboratory bioassays "frequented" the river and it was, therefore, open to the learned Provincial Judge to decline any finding, which he did, that the discharges had been proven a "deleterious substance" as defined by the *Act*.

The frailties of conducting bioassays in laboratory conditions without regard to on-site circumstances in these investigations are reviewed by His Honour Judge Cashman in *Regina v. British Columbia Forest Products Ltd.*, British Columbia County Court, Nanaimo Cr. 663, June 17, 1976 (unreported). On any view the bioassays prepared in this investigation are merely one isolated circumstantial evidentiary fact. The learned Provincial Judge apparently refused to regard them, even inferentially, as proof beyond reasonable doubt of the offence. I am not prepared to attach greater weight to them. On the contrary, I agree with his disposition. The appeal is therefore dismissed.

REGINA v. CANADIAN CELLULOSE COMPANY, LIMITED

British Columbia Provincial Court, Romilly, J., Terrace, B.C., March 14, 1977

Environmental law -- Water pollution -- Deposit of deleterious substance in place under conditions where may enter water frequented by fish -- Defence of due diligence -- Meaning of deleterious -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(8).

The accused corporation was charged after a transformer exploded at its pulp mill causing the release of 210 gallons of polychlorinated biphenyl (PCB) into drains leading to a nearby harbour. The explosion occurred on account of a prior leakage of PCB from the transformer brought about by extensive corrosion of its body.

Held, the accused was convicted. Due diligence had not been exercised in the care and maintenance of the transformer which could have prevented the explosion, nor was there any evidence to support the theory of sabotage. Moreover, the officers and employees of the corporation were negligent in failing to prevent the unlawful deposits after the explosion or to mitigate their harmful effects. In proving the substance deleterious, the Crown was not obliged to lead evidence of the results of tests for acute lethality. The Crown could discharge its burden by introducing expert testimony as to the deleterious nature of the substance in question.

The Queen v. Pierce Fisheries Ltd. (1970), 12 D.L.R. (3d) 591; *R. v. Churchill Cooper Corporation Ltd.*, [1971] 4 W.W.R. 481; *Monkman v. The Queen*, [1972] 3 W.W.R. 686; *R. v. Jordan River Mines Ltd.*, [1972] 3 W.W.R. 30; *Canada Tungsten Mining Corporation Ltd. v. The Queen* (1976), 5 C.E.L.N. 120; *Sweet v. Parsley*, [1970] A.C. 132; *Kienapple v. The Queen* (1975), 15 C.C.C. (2d) 524; *referred to*.

Werner Heinrich, for the Crown.

Robert Gardner and Irene Stewart, for the Accused.

Romilly, J.:--(Orally) These charges were laid under Section 33(2) of the *Fisheries Act*, 1970 R.S.C., C-14, amended in C-17 (1st Supplement) which states:

Subject to Subsection (1) no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

It is obvious Subsection (4) has no application in these proceedings.

The Crown takes the position that the Section creates absolute liability and that the absence of *mens rea* is no defence. The Crown further argues that the Defendant must bring itself under subsection (8) of Section 33 of the *Fisheries Act* to gain an acquittal, although Mr. Gardner suggests that Section 33(8) might not even apply to this particular case.

I am of the view, and even Defence counsel would concede, that *mens rea* does not apply to a prosecution under Section 33(2) of the *Fisheries Act*, although Defence

counsel points out that before we get to that point there has to be some proof that an agent or employee of the company had committed the offence or caused the spill. With the greatest respect, I am not satisfied that I have to satisfy myself that an agent or employee committed the spill. At any rate, from the evidence I have there is no doubt at all that the company was partially, if not totally, responsible for the spill.

I would say at this stage that *mens rea* does not apply under Section 33(2) of the *Fisheries Act*. I will simply adopt what was said by the majority judgment in the Supreme Court of Canada in *The Queen v. Pierce Fisheries Ltd.* (1970), 12 D.L.R. (3d) 591, the more recent decision in *Regina v. Churchill Copper Corporation Ltd.*, [1971] 4 W.W.R., 481, the decision in *Monkman v. The Queen*, [1972] 3 W.W.R., 686, *Regina v. Jordan River Mines Ltd.*, [1974] 4 W.W.R., 337, and *Regina v. McTaggart*, [1972], 3 W.W.R., 30.

Defence counsel made many submissions, but I am going to summarize them and I hope I can deal with all the points that he raised.

- (1) Defence counsel submitted that the Defendant company has established a defence under Section 33(8) of the *Fisheries Act* if it was necessary to establish that defence.
- (2) He indicated that the Crown had not proved the deposit of a deleterious substance, and
- (3) He indicated that there was not sufficient evidence that PCB 1254 reached water frequented by fish.

I shall deal with these submissions in turn.

Has the Defendant company established a defence of due diligence under Section 33(8) of the federal *Fisheries Act*? Section 33(8) of the federal *Fisheries Act* states:

(8) *In a prosecution for an offence under this section, or Section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent his permission.*

It would appear from this subsection that in order for the company to establish a defence under this subsection, the company has to establish (1) that the offence was committed without its knowledge and consent, and (2) that it exercised all due diligence to prevent its commission. After reviewing the evidence at length, after sitting through 11 days of trial, after assessing the various witnesses, assessing their demeanor and what have you, I am satisfied that the spillage of PCB 1254 in this case was accidental. Certainly I am satisfied that the Defendant company did not consent to the spillage of PCB 1254 in the sense of willingly agreeing or hoping for it to enter water frequented by fish. But as was stated in the Supreme Court of the Northwest Territories in the case of *Canada Tungsten Mining Corporation Ltd. v. Her Majesty the Queen*, a decision of Mr. Justice Morrow, reported in (1976) 5 C.E.L.N. 120 (N.W.T.S.C.):

But to avoid liability the appellant must couple a lack of consent with a behaviour of consciousness, which in effect shows it was not blind to the consequences of the possibility, as well as the consequent danger, of a leakage such as is found in the present case.

The general approach to the problem is beautifully expressed in *Sweet v. Parsley*, [1970] A.C. 132, where Lord Diplock states at page 163:

Where penal provisions are of general application to the conduct of ordinary citizens in the course of their everyday life, the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject matter of a statute is a regulation of a particular activity involving potential danger to the public health, safety or morals, in which citizens have a choice as to whether they participate or not, the Court may feel driven to infer an intention of Parliament to impose, by penal sentences, a higher duty of care on those who choose to participate and to place on them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfill the ordinary common law duty of care.

Having found that the accused company has established that the offence was committed without its knowledge or consent, I now have to deal with the question as to whether the accused company exercised all due diligence to prevent the commission of the offence. In this case I have to deal with the question as to whether the company exercised due diligence to prevent the commission of the offence before the explosion of the transformer and immediately after the explosion of the transformer.

Dealing first with the question of due diligence by the company before the explosion of the transformer in Woodroom No. 3, I have to deal with the condition of the transformer and the steps taken to make sure that it was in working order. It was clear from the evidence of Mr. Smart and Mr. Hebron and the photographs which were marked Exhibits 2-A and 2-L in these proceedings that the transformer which eventually exploded was not a very pretty transformer. It is evident from those photographs that the transformer showed signs of advanced rust. In fact, they appeared to be so rusty on the fins that Mr. Carscadden felt that if he was shown a photograph of a transformer in that shape he would make sure that it was checked on a daily or shift basis and efforts would be made, in his opinion, to have it replaced as soon as possible. In this case the Defendant company wasn't about to take this type of precaution. The Defendant company felt that the transformer was in good working condition and tested it on a weekly basis or at least every three days. This was even after the transformer developed a pin-hole leak sometime in October or November of 1976. When the transformer developed a pin-hole leak, instead of replacing the fins or trying to see if the transformer could be replaced the company, according to the evidence of Mr. Tindale, placed a plug into the fins of the transformer, something which the experts Dr. Levelton and Mr. Carscadden indicated should not be done. There was some question as to whether a plug could be a part of an epoxy process that the company was using to prevent leaking, but it is evident from a careful perusal of the evidence that the reference was to a plug and not to a part of the epoxy. You will recall from the evidence that there were references to a plug being seen next to the

transformer after the explosion. There is no reference to that being part of the epoxy. Two witnesses at least, Mr. Tindale and Mr. Townsend, refer to this plug being seen at the site of the transformer after the explosion. Dr. Levelton was asked as to whether the plug could be a part of the epoxy process, and Dr. Levelton indicated that it could be in certain circumstances. He indicated in response to a question from the bench that he saw no sign of any epoxy on the fins of the transformer which he examined, the transformer which was located in Woodroom No. 3. In fact, Mr. Townsend, one of the first persons to witness the exploded transformer in Woodroom No. 3, was brought all the way from Nova Scotia under subpoena by Defence counsel but he was asked to be excused by the court before he could shed some light as to whether it was a plug that was in fact inserted into the fins of the transformer. It is true that Dr. Levelton was called by the Defence and established that this rust on the tank of the transformer and the fins of the transformer was merely superficial rust and didn't really attack the metal to any great extent, but his evidence had to be academic when we realize that the only part of the fins of the transformer that eventually ruptured and from which there is no doubt that the vast amount, if not all of the PCB 1254 leaked, was an 18-inch portion which was taken from the transformer before Dr. Levelton had a chance to look at it. With Dr. Levelton not being able to examine that portion, that crucial 18 inches of the fins of the transformer, I have no alternative but to accept the evidence of Mr. Smart and Mr. Hebron and the pictures that they produced in court with respect to the state of the transformer and in particular the fin portion of the transformer that eventually exploded. You would recall that Mr. Smart indicated that portion was so rusty that a slight pressure with one finger caused fluid to seep out from the transformer. The Defence counsel raised the theory of sabotage by a person or persons unknown. To substantiate this theory he called Mr. David John Walker, who suggested that security at the plant couldn't really be maintained because of a CNR right-of-way which went through the premises of the Defendant company. Dr. Levelton was also asked to speculate with respect to the implosion that was referred to by Mr. Tindale and the fact that the portion of the fins that ruptured appeared to be bent inward. This sabotage theory, in my respectful opinion, was just that -- a theory. I am not satisfied that this theory was substantiated in any way, shape or form by any credible evidence that was brought before me in this trial. As a matter of fact, it was suggested by Mr. Carscadden that this inward turning of this particular rupture in the fins could have possibly been caused by a plug being inserted into one of the fins, the very thing that Mr. Tindale told us was inserted to patch a pin-hole leak. One would have expected that with the surges of power that Mr. Burchardt mentioned, and the surges which were also described so accurately by Mr. Wiole, and the activity that one would expect in a transformer that the company would have been more careful about having equipment that could possibly withstand those types of pressures rather than this type of rusty equipment which I find was situated on Woodroom No. 3 and eventually exploded.

Of course, one just can't overlook the opinion of Mr. Tindale, who had the occasion to look at this transformer almost immediately, who was responsible to a certain extent for servicing it, and after it exploded and after he had some time to think of it and after having quite a bit of experience dealing with transformers themselves, he said in his opinion the explosion of the transformer was due to the corrosion of the fins. He felt that because of the corrosion of the fins the transformer lost oil and as a result of the loss of oil there was, in his opinion, this explosion which caused the transformer to fail. This is an opinion given by one of the employees of the company, a person in charge of the neurojet program and one who had some

supervision over the electrical system, it would appear, of the company. This opinion is in part supported by Mr. Carscadden whose evidence I dealt with while reciting the evidence and making certain finding of fact. On the basis of the foregoing, I am not satisfied at all that the Defendant company in this case exercised the due diligence that one would expect the company to exercise to prevent the commission of the offence.

After the explosion the company was fortunate that their attention was drawn to this transformer. They were fortunate because as soon as this transformer failed, the lights in the woodroom area went out. The representatives of the company, however, in my opinion, refused to be concerned with the environmental aspects or the environmental hazards of this explosion. According to the evidence of Mr. Nickolichuk and Mr. Tindale, all went to the scene to see what the trouble was. They were all able to ascertain that the transformer had exploded. According to the evidence that I heard, and after reading the transcript carefully, it becomes evident that Mr. Nickilichuk, Mr. Townsend and Mr. Tindale were mainly concerned with making a business decision; that is, the business decision of replacing the transformer in Woodroom No. 3 as soon as possible. No one really noticed much about the surroundings of the transformer and in particular whether or not any of the PCB 1254, which was contained in the transformer, was leaking. Obviously someone other than these three witnesses may have noticed it because the letters from Mr. Kruett and Mr. Halliday which were marked in evidence indicated they noticed some PCB 1254 had leaked after the explosion of the 22nd of January. The officials, whoever they may be, felt however, it was all contained on the roof. It would appear from the evidence that because of this negligence, because of this inability to take the precaution of preventing the spill of this toxic substance which was contained in the transformer, the inevitable happened. A large amount of PCB 1254, approximately 210 gallons, spilled onto the roof, into the caves, down the sides of the caves, into the drains, into the interceptors -- interceptors which drained directly into Porpoise Harbour. The Defendant company says that the reason this wasn't noticed earlier than the 24th of January, 1977, was because the mill was not in full operation, whatever that means. At any rate, on the 24th of January, 1977, I am satisfied that when the company officials resumed full operations a considerable amount of PCB was found on the roof, was found in the eaves, was found at the site of Woodroom No. 3, was overflowing in the interceptors and in fact, there was PCB all over the place, as evidenced by the large amount of sawdust -- sawdust eight feet wide, one foot deep -- along one side of Woodroom No. 3. There were a large number of drums being used to seal the substance away, there was a large amount of wood that had to be sawed up on the roof itself and the roof had to be replaced and all sorts of steps had to be taken to prevent a further spillage of this toxic chemical. That this PCB 1254 got into the interceptors that flowed directly into the Southern Outfall is evident from the evidence of Mr. Smart and Mr. Hebron who described what they saw on the 24th of January. The evidence of Mr. Hebron is that even on the 27th of January, 1977, the interceptors were full of sediment. I have no doubt that the substance contained in the interceptors, even up to the 27th of January, was PCB 1254. This was the substance that was sampled by Mr. Hebron in the interceptors marked "H" and "J" in red on Exhibit 4, and remember that substance was the substance that was analyzed by Mr. Sargent and that was the substance the Crown claims flowed directly into the Southern Outfall into Porpoise Harbour. You will recall Mr. Sargent had a chance to test the sediment from these interceptors from the sediment samples. You will recall that one of the sediments was marked "EPS 14" and the other one "EPS 19". You will recall

that when Mr. Sargent attempted to test the samples the response was so strong that the instrument was unable to record a reading. Is it any wonder, especially when one considers that the substance that was spilled from that transformer contained 950,000 parts per million of PCB. All it seems to have taken down on its way into these interceptors was some tar from the roof. I'm satisfied from Monday, the 24th of January, 1977, the company took all steps necessary to prevent further spillage from the transformer and to prevent further amounts of PCB 1254 from entering the harbour through the interceptors. I am not satisfied from the evidence and from what I have said so far that the company exercised due diligence after the explosion to prevent the spillage of approximately 210 gallons of PCB 1254.

The next Defence raised is that the Crown has failed to prove the deposit of a deleterious substance, PCB 1254, or that the Crown has failed to prove that PCB 1254 is in fact a deleterious substance. Section 33(11) of the federal *Fisheries Act* defines deleterious:

Deleterious substance" means: (a) any substance that, if added to any water would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered deleterious to fish or to the use by man of fish that frequent that water.

Defence counsel submits that the best way to prove whether PCB has any effect on fish, and in particular whether any PCB that may have been spilled into Porpoise Harbour had any effect on the fish in that harbour was to conduct a bio-assay of the fish. Defence counsel said that a bio-assay was not done by the Crown. The Defence counsel indicated that the Defendant company did their own test. They indicated that although there is no onus and should be no onus on the Defendant company, they did their own testing in an effort to help the court. They indicated that Dr. Vigers conducted a test with herring with PCB sediment at levels of 2.6 parts per million, 42 parts per million and one control sample over a period of 30 days. Defence took the position that results showed conclusively that PCB contaminated sediment with levels of up to 42 parts per million had no harmful effect on herring tested. Defence counsel also referred to evidence of Dr. Vigers that fathead minnows were known to survive in PCB water containing sediment with contamination levels of up to 500 parts per million over a period of 32 days. As I stated before, I find the test conducted by Dr. Vigers far from conclusive; in fact, I find it pretty inconclusive. The tests were conducted with herring that had PCB present in the fish to begin with, they were treated with contaminated food. The herring, it was admitted, were not bottom borders like the sole which was found in Porpoise Harbour itself. There was no effort that I am aware of trying to have this sediment used in the experiment similar to the sediment that existed at Porpoise Harbour -- that is, sediment with quite a bit of particulate matter to which it was alleged that PCB had a tendency to cling. The particulate matter you will recall was described by Ms. Garrett when she took a sample of the water and sediment and tried to get it to settle, -- water and sediment from Porpoise Harbour. There was no effort made, it seems to me in my respectful opinion to reproduce the type of activity that might exist and in fact does exist at Porpoise Harbour. There was no effort to refer to the food chain build-up that was referred to by Ms. Garrett. There was too much emphasis in my opinion on the mortality rate rather than the sub-lethal effects described so adequately by Ms. Garrett -- effects with respect to the hatchability of the fish, the thyroid activity, their inability to fend off predators. I accept Ms. Garrett's testimony that it is very

difficult to do laboratory experiments for the effects of PCB on fish. I accept her testimony that PCB is in fact deleterious in small amounts. In any event, Dr. Vigers who was called by Defence counsel admitted that PCB in tens of parts per million, PCB 1254, would be deleterious to fish. He further stated that levels of 2,025 parts per million and 3,000 parts per million would be deleterious to fish, although I must admit that he tempered that somewhat when under re-examination. These two levels were found just below the Southern Outfall in Porpoise Harbour by Messrs. Packman and Nelson. One could only imagine what effect levels of 8,554 parts per million would have on fish. There were samples taken by Mr. Ho and his technician of shellfish obtained 100 feet from the Southern Outfall and a quarter mile from the Southern Outfall. In my opinion they really established nothing except to establish that both these samples had no PCB present. It should be noted in this particular case that the grid system that was suggested by Defence counsel as a proper method of collecting sediment samples was not used. It may very well be that these shellfish were nowhere near the pool of PCB that was alleged to have been eventually deposited into Porpoise Harbour. There is also no indication as to when the shellfish came into the area. In any event, they established very little as to the effects of PCB 1254 on the fish generally found and in Porpoise Harbour in particular.

There was some reference as to whether tests should be done of fish in situ and whether any tests in any waters frequented by fish would be enough. This is quite an important point and perhaps I should refer to it. I realize that what His Honour Judge Cashman said and I realize what was said in the *Athabasca* case but I prefer the dicta of His Honour Judge Catliff in the case of *R. v. Imperial Oil Limited and British Columbia Hydro and Power Authority* unreported, B.C. Co. Ct., 20 November 1975. His Honour at page 10 of his decision had this to say:

The point as I understand it is that the words 'that water' in Section 33(11) have reference only to the water alleged to be degraded at the actual site of the spill. I do not consider the words 'that water' are to be so construed. In my view they refer to the words 'any water' earlier in the subsection. The words 'any water' would include the water at the site of a spill but are clearly not limited to it. The only qualifications to be attached to the words 'any water' is that such water must be proved to be frequented by fish. As I say, the water used by the Crown's expert in his experiments was water taken from Burrard Inlet which is water admittedly frequented by fish.

I am satisfied in this case that no satisfactory tests were done. I am satisfied that in this particular case it was not possible to conduct the type of tests that could be conducted to show the full life cycle effects and to show the body burdens as was suggested Ms. Garrett. She suggested it was very, very difficult indeed, to conduct these tests. Because of the difficulty in doing these types of tests, I am satisfied that in this particular case I could rely on the opinions of the experts -- the readings, of the opinions of very many people who have done research in these fields and who have published papers, the papers that Ms. Garrett and Dr. Vigers have had access to.

The last Defence and perhaps the one that causes me the most concern is the Defence raised by Defence counsel that there is not sufficient evidence that PCB 1254 reached water frequented by fish. Defence counsel submitted that tests done by Messrs. Thompson and Sargent were meaningless in that they were not done in a very scientific manner. Defence counsel suggested that the destruction of the samples

before they had a chance to cross-examine on them certainly means that any results that were received, if accepted by the court, should be given very little weight indeed. Defence counsel indicated that the samples were not taken in a properly prepared bottle and in addition to that, Defence counsel claimed that there was sulfur present and that no effort was made to remove sulfur from the samples before they were tested, thus affecting the results. Defence counsel also dealt with the question of the Eckman Grab Sampler being used. An Eckman Grab Sampler which they submitted may have been used for other PCB related projects and may well have been contaminated. Defence counsel said that their independent tests (two tests) away from the alleged site of the spill, some distance away from the alleged spill, into the Southern Outfall in Porpoise Harbour showed that there was little or no PCB present in Porpoise Harbour. It showed that there was a reading of .10 parts per million of PCB which the Defence claimed was the normal type of PCB around any commercial plant. With the greatest respect to Defence counsel, however, I have already dealt with this matter on the No Evidence Motion. I have pointed out that it would have been better if the Crown had kept its samples, but the fact that they were destroyed really doesn't mean that the results of the sampling cannot be introduced into evidence. I have already ruled on the No Evidence Motion that the fact that the samples were not present or that all the samples were not present in court affects the weight to be attached to this evidence. I agree that little weight should be attached to the results. In any event, at least three of these samples were kept and introduced into evidence. At least three of these gas chromatograms were introduced by Mr. Thompson to show how or what his readings were and to show what sort of graphs he got as a result of the tests he conducted. As I pointed out before, Messrs. Thompson and Sargent indicated that there was no elemental sulfur present. In any event, if there were, it would have no effect on their readings. If I remember Dr. Hasman's evidence, he said when pressed about whether sulfur had to be removed he kept retreating to the answer, "I removed it in my sample. I decided to make it a practice in the lab that it be removed". In any event, Dr. Hasman pointed out that the presence of sulfur would affect the detectors and therefore make the gas chromatograph unable to pick up PCB, or it may affect the base line; but in any event he indicated that the presence of sulfur would show up in the gas chromatograph. Both Messrs. Thompson and Sargent pointed out that no sulfur showed up although under cross-examination Mr. Sargent indicated that there were no detectable signs of elemental sulfur present. In any event, this Defence argument about sulfur, while interesting, is really not that persuasive especially when I look at the facts in this particular case. I have to remember that in this particular case there is no doubt at all that there was an explosion. There is no doubt at all that approximately 210 gallons of PCB 1254 was spilled from the transformer. There is no doubt at all that approximately 210 gallons of PCB not only spilled out on the roof of Woodroom No. 3, but also went into the eaves of Woodroom No. 3, down the down spouts, into the interceptors, interceptors which flowed directly into the Southern Outfall in Porpoise Harbour. You would recall that the concentration of PCB 1254 from the transformer was 950,000 parts per million. There was no sulfur in that. You would recall that from the evidence there is no doubt that the PCB left the transformer and some of the PCB left this transformer and went right down into the interceptors. This was noticed on the 24th of January by Mr. Smart and other people. Even as late as the 27th of January large amounts of PCB were noticed in the sediment of the overflowing interceptors which flowed directly into Porpoise Harbour. Is there any wonder that readings similar to the readings found by Mr. Sargent were found in the sediment right below and immediately near to the pipe which flowed into the Southern Outfall into Porpoise Harbour. Is it any wonder

that the results of 8,554 parts per million and results of 2,025 parts per million and results of 3,725 parts per million were found in that setting? To hold that these results were erroneous is perhaps to defy the ordinary rules of common sense and logic. In my opinion, however, the readings were just icing on the cake from the Crown's point of view. There is almost an irresistible inference that the PCB 1254 which flowed from the roof into these interceptors did in fact go or flow directly into the sediment just below the Southern Outfall pipe. Mr. Gardner suggested that PCB is heavier than water and that's accepted. He said the dye test suggested that water or maybe dye would flow directly from the interceptors through the Southern Outfall pipe into Porpoise Harbour but it would likely not be the same with PCB. There was not however, only water in these interceptors on the 27th January, 1977. According to my recollection of the evidence, these interceptors were filled with sludge and sediment, and water. That the substance flowed directly from the interceptors to the harbour was evidenced from the personal observations of Mr. Hebron and the result of the water samples which were received by Mr. Hebron on the 30th of January, the 9th of March, 1977. In any event, I don't have to deal with the question of whether the sediment did in fact get into Porpoise Harbour, or whether that type of concentration got into Porpoise Harbour. I am satisfied from the evidence that when PCB 1254 reached the interceptors -- in an unadulterated form presumably after looking at EPS 14 and the results -- which flowed directly into the Southern Outfall into Porpoise Harbour it was certainly in a place under conditions where such deleterious substance may enter water frequented by fish. It is obvious that the deleterious material could have entered water frequented by fish because of the readings received from the water samples on the 30th of January, 1977, and the 9th of March, 1977.

I am satisfied after reviewing all the evidence, after sitting through almost 11 days of trial, after having a chance to assess the witnesses and assess the evidence, that the Crown has succeeded in establishing beyond a reasonable doubt that Count 6 has been made out. I find the accused guilty of Count 6. I have held before that the other charges in that group of four are in the alternative on the basis of *Regina v. Keinapple*. I'm not going to enter convictions with respect to the counts which are related to Count 5, 7 and 8.

I am not satisfied, however, that any deposit was made on the 21st of January, 1977. The evidence is quite clear that if there was a deposit, which I find there was in the interceptors, there was certainly a deposit from the 22nd of January onward. Count 6 would be amended to conform with the evidence and I find that there was permitted a deposit on the 22nd of January, 1977, to the 28th of January, 1977.

I have held before that the Information deals with four groups of four counts and I hold that with respect to Counts 9, 10, 11 and 12 which allege the deposit of a deleterious substance on the 30th of January, 1977, there is a doubt as to whether the sample or the reading received from that water sample was in fact deleterious or could in fact be deleterious to fish, although a reading of 1.45 parts per million would appear to be an extremely high reading if you listen to Ms. Garrett's testimony. I am not satisfied I have proof beyond a reasonable doubt that either of these counts have been made out, that is, Counts 9, 10, 11 and 12. As I said, there is a reasonable doubt and these counts will be dismissed.

With respect to Counts 13, 14, 15 and 16 which refer to another water sample on the 9th of March, 1977, the same applies and I am going to dismiss those Counts.

Again, with respect to the last set of Counts, Counts 17 to 20, which deal with the samples taken by Mr. McKenzie, I have already dealt with that in my review of the evidence. I have a doubt that these samples were properly taken and I have more than a doubt in any event, even if they were properly taken, that readings similar to .10 parts per million would in fact be deleterious to fish.

I find the accused guilty of Count 6. All the other counts are dismissed.

(SUBMISSIONS IN REGARD TO SENTENCE)

The accused has been convicted of Count 6. The amended Count 6 says that the company

At or near Prince Rupert, British Columbia, between the 22nd day of January, 1977 and the 28th day of January, 1977 did unlawfully permit the deposit of a deleterious substance, to wit: Polychlorinated Byphenil 1254, in a place under conditions where such deleterious substance may enter water frequented by fish, contrary to Section 33(2) of the Fisheries Act, R.S.C. 1970, C. F-14 and C. 17 (1st Supplement)"

I am satisfied after taking into consideration the principles enunciated in *Canada Tungsten Mining Corporation Limited v. The Queen* with respect to sentence, after reading the other cases that deal with sentence of these types of offences, after hearing the submissions of Defence counsel and Crown counsel, after hearing the fact that the Defendant company has already spent \$200,000.00 on clean-up of the spill, I am satisfied that a sentence should be imposed against the Defendant company of \$3,500.00 per day -- that is \$3,500.00 for each day from the 22nd to the 28th of January, 1977, inclusive.

Note: The appeal is reported at page 256.

REGINA v. AMERICAN CAN OF CANADA LIMITED

Ontario Provincial Court, Thunder Bay, Duthie, J., April 4, 1977

Environmental law -- Water pollution -- Sentence -- Pollution of waters by mercury -- Circumstances not justifying maximum penalty -- Four thousand dollar fine -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

The accused plead guilty to sixteen counts of violating s. 33(2) of the Fisheries Act which resulted in the pollution by mercury of a harbour adjacent to its plant.

Held, the fine of four thousand dollars was levied against the accused on each count. While company was at times negligent and indifferent to the consequences of its actions, it had also taken some positive steps to control the pollution. The plea of guilty and the absence of previous convictions were factors which could mitigate sentence, even though the damage was quite extensive. Accordingly, the objectives of deterrence and the protection of society could be met by less than the maximum penalty.

Cyprus Anvil Mining Corporation Limited v. The Queen, unreported, Y.T.S.C., March 26, 1976; *refd to*.

L. McCaffery, for the Crown.

J. Brown, for the Accused

Duthie, J.:--Yes, this has caused difficulty in the past in sentencing on matters concerning the environment. This is illustrated by one of the cases that you quoted, *Cyprus Anvil Mining Corporation*. There seems to be a feeling among many members of the public, that fines in cases of this nature are too low, and that large multi national corporations can afford large amounts of money by way of fines, and that, therefore, maximum fines should be imposed, somehow to make up for the presumed deficiency in the maximum amount permitted by Legislation.

The cases quoted by the Crown today illustrate the manner in which various courts rationalized why maximum fines should be imposed in this type of situation. While impressive, I do not wish to forget other important principles of sentencing the purposes of which, first of all, are to protect all members of our society. In the case of a fine, as with all other penalties, one of the main objectives is of course deterrence. Now I would be naive to think that the accused corporation in this case is not in a good financial position. Maybe I should say, I would be surprised if it was not. I think therefore, that to be a deterrence, the fine has to be substantial enough to make an impression on this and other offending companies, or potential offenders.

On the other hand, there must be justification for imposing a penalty in the maximum amount allowed by law. The offence must, I feel, be one indicative of very substantial lawlessness or extremely wrongful circumstances. Therefore, there are other factors that have to be considered.

Mr. Brown speaks of there being no "flagrant violations" while Mrs. McCaffery quotes the company's wrong doing as "open and defiant." I think neither of those

descriptions is appropriate in this case. Perhaps "open", yes. But I wonder if there was "defiance" here, I really haven't recognized evidence in the summary which would illustrate "defiance". I think perhaps I have seen indications of neglect and even indifference at times. However I think I have also seen spurts of endeavour from the company from time to time, granted perhaps more so when pressure from the Ministry was applied, to attempt to employ the recommended devices necessary for filtering out the deleterious substances.

The company certainly did not sit back and do nothing. Certain procedural recommendations were implemented. Subsequently however, most were abandoned. Mr. Brown says one of the reasons for this was that the procedures themselves were at times found to be unsatisfactory or unworkable. We find for example, a holding tank being used for a purpose completely unrelated to prevention of the pollution for which it was originally intended. We find a centrifuge not working according to Mr. Brown, because the substance was, and I don't recall the exact word used, but it was to the effect that the substance was too heavy for the machine to handle. These are indications to me that the company made attempts to overcome the problems although I think they could have made stronger attempts or been more persistent. I believe the Order issued by Mr. Pitura in April, 1976, which advised the company that if the Ministry requirements were not met that it would be required to cease production, was a catalyst, if I may be allowed to borrow that term from the chemical discussions we've had today, which caused the company only then to appreciate how seriously its violations were being considered. In any event, that obviously was an effective procedure by the Ministry which caused the company to realize at that stage that the Ministry was no longer going to act in a spirit of co-operation with the company, if in fact the company had been under this impression earlier.

But I certainly don't get the impression from the evidence that there was anything like a constant battle going on between the Ministry officials and this company trying to get it to clean up its act. This impression I do get, as I said, is possibly that of neglect in pursuing vigorously the Ministry's suggestions and recommendations. But certainly, there was no flagrant disobedience of recommendations, nor violations in a way that would seem designed to dare the Ministry to take action. I can't see that from any of the evidence before the Court.

Now, examining the harmful effects of this substance in the case before the Court, I do not have sufficient evidence to accurately conclude just what are the permanent long term effects of mercury pollution, if I may use that phrase. However, I certainly am of the impression that they are not beneficial.

There was a brief submission concerning Minamata and problems that have occurred in other countries because of alleged related polluting activities but I don't think I can apply that to our situation here.

The size of the polluted Bay, or Peninsula Harbour as it's designated on the map, would seem to be about two miles by three miles. So say about six square miles in area. A fairly good sized harbour. The Crown's submissions are that the fish life in this harbour is no longer any good and the human community surrounding Peninsula Harbour can no longer safely use the fish or animal life from the waters for food because of the levels of the mercury found in the various areas in Peninsula Harbour where tests were taken.

I find that that would be a fairly acceptable submission, at least with present knowledge. I think it certainly would be advisable if people avoided eating the products of that harbour, if only to the extent that Mrs. McCaffery mentioned, that is, the Government suggested safe levels. I cannot find however, that there are any harmful effects to anybody at this time. Mrs. McCaffery suggests that it's impossible to put a price on damage done to the harbour. With that I agree. To try and figure out just what in dollar value would be the cost of such treatment of the harbour would be a monumental task.

This Court, fortunately at this time, does not have to try and calculate that. The company has, as Mr. Brown pointed out, entered pleas of guilty to the charges. I think that in itself is an indication of the present attitude of the company. It's prepared, it seems, to take its penalty because of its breaches of the Act, and comes before the Court without contesting the charges, ready to admit that it did wrong. Indications are that the matter will soon be finally cleared up because of the proposed closing of the offending plant before long, and the product being obtained instead from another source. Certainly these are matters to be considered.

Another important element to be considered is the fact that there have been no previous offences of this nature charged against this company or in any event no convictions entered.

Again, in regard to the amount of the fines, considering that there are increases of the maximum amount in the offing, the penalties in the future may be much more significant to companies convicted of pollution offences. At the present time however, the legislation with which we are dealing limits the maximum fine to \$5,000.00. Any quarrel then with that maximum has to be taken up with the legislature, the governing body which defines these limits. I think to consider what they might be in the future as any basis for a penalty at the present time is wrong. I think as far as we are concerned I have to consider the legislation that is in effect now and not something that may, or may not, be passed at some other time.

I will then take into consideration all these matters, including the important fact that the company as I said, for the most part, did try to meet the requirements, although it lacked the endeavour necessary to achieve Ministry specifications.

Possibly a further matter that might be considered is the prominence now in realization of the importance of preventing pollution of the natural environment.

Thankfully, governing agencies and the public seem to be awakened to the fact that our resources are rapidly being depleted both by consumption and by pollution, and I think we are faced with having to consider that almost daily. We're becoming more cognizant of these facts, which even two or three years ago, were not in the minds of many people as important as they are now. This may have been the cause in the past of seeming indifference in the attitude of companies to responsibilities in regard to the environment. However, this, thankfully, is changing now. I believe work done by government environmental agencies and interested public groups is certainly benefitting everyone. There is more awareness, I believe, as to the value of our resources and how necessary it is to protect them. Had the present day attitude been in existence only a few years earlier, we would likely be in a much better

environmental position today. Now we are faced with serious problems which hopefully may still be corrected. It certainly seems to have been in this instance.

Although I suppose that we always have to have, as Mrs. McCaffery points out, a certain amount of tolerance for pollution, because without it, certain types of industries cannot exist, nevertheless, hopefully technology will be developed to the point that sometime in the near future that tolerance need only be minimal. That may be just wishful thinking.

Based on all the circumstances then, there will be a conviction registered against the company on all the counts with which it was charged, the total of sixteen. In regard to the fines, I do not feel, for the reasons I have expressed, that the maximum amounts are appropriate in this case. However, I do think they should be significant so that it will clearly signify that the Court cannot and will not tolerate pollution of the waters or any part of our environment.

Therefore, I deem the proper amount of each fine to be in the amount of \$4,000.00 which I now levy against the accused on each of these counts.

**REGINA v. MCINTYRE MINES LTD., UNDERWOOD McLELLAN ASSOCIATES LTD.,
AND WAGRO CONSTRUCTION (1969) LTD.**

Provincial Court of Alberta, Porter, J., January 12, 1978

Waters and watercourses -- Permitting debris to be put in creek -- Sand and silt not debris -- Defendants not engaged in coal mining or logging operations -- No unlawful diversion of waters -- The Fisheries Act, R.S.C. 1970, c. F-14, s. 33 am. 1970, c. 17 (1st Supp.), s. 3(2) -- The Water Resources Act, R.S.A. 1970, c. 388.

The defendant McIntyre had contracted with the other two defendants to build a coal haul road. During the course of construction, unduly heavy rainfall occurred and as a result of the operations a large quantity of mud flowed into a pond and thence into a creek where fish were found. The defendants were charged with knowingly allowing debris to be put into a creek where fish were to be found (*Fisheries Act*) and unlawfully diverting the flow of the water (*Alberta Water Resources Act*).

Held, the defendants were found not guilty of the charges. The defendants were not, in constructing the road, engaged in coal mining operations, even though one of the defendants was in fact carrying on mining operations in the area. Nor were they involved in "logging, lumbering or land clearing". Road construction could not be considered in the category of logging, lumbering or land clearing, nor did it come within the meaning of "other operations" in s. 33(3) of the *Fisheries Act*. The only evidence of foreign substance in the water was of mud or silt, which did not amount to "debris". The defendants, through carelessness, could be taken to have "knowingly" permitted the damage to be caused.

Second Judgment: While there was, technically, a division of the stream by the introduction of the mud, the tenor of the Water Resources Act was concerned with diversions or undertakings having a serious effect on the stream or watercourse, and an offence of that magnitude was not involved in this instance.

Johnston v. Can. Credit Men's Trust Assn., [1932] S.C.R. 219, 58 C.C.C. 1, [1932] 2 D.L.R. 462; *Thames & Mersey Marine Insur. Co. Ltd. v. Hamilton, Fraser & Co.* [1887], 12 App. Cas. 484 (H.L.) referred to.

R. v. Pierce Fisheries Ltd., [1971] S.C.R. 5, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591 followed.

(Headnote from (1978), 5 Alta. L.R. 201.)

D.W. Kilgour, for the Crown

B. Thompson, D. Thomas, for the Defence

Porter, J.: (Re: *Fisheries Act*)--McIntyre Mines Ltd., (McIntyre, Underwood McLellan Associates Ltd., (Underwood), and Wagro Construction (1969) Ltd., (Wagro), are jointly charged as follows:

that they on or about the 25th day of July, A.D. 1977, near Grande Cache, in the Province of Alberta did, being persons engaged in coal mining operations, knowingly permit to be put debris into a water frequented by fish, namely the Sheep Creek, contrary to section 33(3) of the Fisheries Act as amended to date.

The following are issues arising:

1. a) Was McIntyre engaged in any coal mining operations relevant to the charge before the Court.
 b) If not, was McIntyre engaged in a "road construction operation".
 c) If so, should the Information be amended under s. 732 of the Criminal Code, to conform to the evidence.
2. a) Was Underwood engaged in any coal mining operations relevant to the charge before the Court.
 b) If not, was Underwood engaged in a "road construction operation".
 c) If so, should the Information be amended under s. 732 of the Criminal Code to conform with the evidence.
3. a) Was Wagro engaged in any coal mining operations relevant to the charge before the Court.
 b) If not, was Wagro engaged in a "road construction operation".
 c) If so, should the Information be amended under s. 732 of the Criminal Code to conform with the evidence.
4. Can, by virtue of the fact that each of the accused companies was engaged in a "road construction operation", any or all of them be said to be engaged in "logging, lumbering, land clearing or other operations" as set out in s. 33(3) of the *Fisheries Act* having regard to the *ejusdem generis* rule.
5. Was the substance which entered Sheep Creek debris.
6. Is this an offence of strict liability and what import is to be given to the word "knowingly".
7. What is the relationship of each company to the others and are any of them agents or employees of any other.
8. Did any of the accused "knowingly permit to be put" anything into the waters of Sheep Creek.
9. If the answer to "8" is yes, can any of the companies avail themselves of subsection 33(8) of the *Fisheries Act*.

10. Are the waters of Sheep Creek at the point in question frequented by fish.

Turning now to the evidence, I might say at the outset that it was a pleasure to listen to the witnesses for both sides. It was one of those cases where the basic facts were not greatly in dispute and the Court heard a number of witnesses for both sides, all of whom appeared most professional in their chosen fields and gave honest and forthright evidence. The consequences flowing from that evidence and the legal implications thereof are somewhat more complex.

I make the following findings of fact:

It was alleged as a fact by the Crown and admitted by the Defence that on the 22nd of December 1977, each of the defendant companies was a body corporate registered to carry on business in the Province of Alberta.

It did not appear to be alleged that this was the case on the 25th July 1977, the relevant date, but this has not been raised as an issue by the defence and it would be a reasonable inference to draw from the evidence that this situation prevailed on the 25th July 1977 and I now draw that inference, particularly as the parties have indicated they want a decision on the merits.

Secondly, it was alleged as a fact by the Crown that McIntyre on the 25th July 1977 was a person engaged in coal mining operations and carried on such activities on that date at a point in Alberta near Grande Cache, Alberta.

In the summer of 1977, McIntyre contracted with Underwood to design, survey, provide inspection services and supervise the construction of a coal haul road, in the region of its coal mining activities. The work on site was physically undertaken by an Underwood employee named Brian Morel.

McIntyre entered into a second contract in the summer of 1977 with Wagro to construct the said road under the supervision of Underwood. The foreman for Wagro was the witness Piercey.

McIntyre was to have no direct involvement in the construction unless there was additional expense to be incurred when their Chief Engineer, a Mr. Wright, was to be consulted.

At the scene in question, there was a fairly steep slope leading at the bottom to a stream of water called Sheep Creek. At the top of the relevant part of this slope was a pond referred to as Reiff Terrace Mine Pad Pond. This is marked "A" on the Plan Exhibit 3 and I will refer to it as pond A. The purpose of pond A appeared to be to act as a reservoir for water pumped out of an adjacent mine. The water was fairly clean and was recycled to be used for washing and bathing by the miners. This was a large body of water.

A little below pond A down the slope was the upper part of the coal haul road referred to in the evidence as the upper road. The road descended in a Westerly direction for approximately a quarter of a mile, made a hairpin turn to the east and passed back along the slope below the upper road and pond A. This was called the

lower road. The upper road passed directly by pond A and the road appeared to originally form part of the bank to the pond.

Through the lower road directly underneath pond A was a culvert which appeared to service a natural water course flowing down the slope. Into this water course flowed water from the adjacent slopes and of particular relevance from a nearby disused, open pit mine taking with it any coal dust, sludge, mud or other sediment. This water passed through the culvert and followed another natural water course to a pond marked B on Plan Exhibit 3. This pond, somewhat smaller than pond A, was called a settling pond. Its purpose was to collect the water coming down the slope via the water course, allowing any sediment to settle out to the bottom and any excess clean water would pass over a dam at the far side and continue down the water course where it entered Sheep Creek at a point marked C on Plan Exhibit 3.

This arrangement I find was a perfectly satisfactory and acceptable way of dealing with the situation in the absence of any complications. Complications, however, developed. As a result of the inclement weather and particularly a heavy rainfall on and around 11th July, a segment of the upper road adjacent to pond A slipped, resulting in a considerable quantity of mud and gravel falling into the top of the water course at point S on plan Exhibit 3. This, over the next few days, moved to the lower road at point M and blocked the culvert.

This slide was inspected by Mr. Morel and he concluded that there was a compaction problem. He spoke with Mr. Wright and suggested that the water in pond A be lowered by means of first creating a coffer dam above the road, installing a culvert through the road, and thereafter lowering the coffer dam by six feet so the water could flow through the culvert. This would then enable the road itself to be lowered by six feet. Mr. Wright was consulted as this would involve additional expense. He agreed with the proposal and authorised it subject to the rider that the coffer dam was not to be lowered by more than six inches per hour which would provide for a maximum outflow of 1,000 gallons per minute. The design capacity of the settling pond B was to receive no more than 2,800 gallons per minute and there was thus an acceptable tolerance to allow the water to settle out before it went over the dam to Sheep Creek. Mr. Wright advised Mr. Morel of this. The lowering of the coffer dam was commenced on Saturday the 23rd July 1977 by Wagro employees. Mr. Piercey indicated that he was told by Mr. Morel not to lower the dam more than six inches per hour which instructions he followed. Mr. Morel indicates that the dam was lowered one foot on Saturday. Mr. Piercey said two feet. The remainder was lowered on Sunday. I am perfectly satisfied that Mr. Wright's instructions were followed in this respect on both Saturday and Sunday.

Brian Morel saw the water disappear down the water course at the point at which it crossed both the upper and lower roads. He authorized the cutting of a trench across the lower road as the culvert was blocked. He did not concern himself with where the water was going and knew not if there was any water already in pond B. The trench was cut by Piercey on Sunday, 24th July at which time he attempted to separate the mud from the water and retain the mud above the road. Until the trench was cut, most of the water and mud had travelled along the upper part of the lower road in an easterly direction to a point or points unknown. A small amount of water had crossed the road itself. Piercey did not inspect pond B thereafter. Wright was of the opinion and I am satisfied of this as a fact that if the road had not been cut, the mud would

not have reached pond B. At some stage McIntyre employees cleaned out the culvert but it was not clear to me from the evidence whether this was before or after 24th July and I make no finding in this respect.

On Monday, 25th July, Forestry Officer Sitar inspected pond B among other things and observed a large amount of mud forming on a third of the pond on the side where the water entered and voluminous quantities of muddy water going over and around the dam down the water course to Sheep Creek. He followed the water course down to the creek, observed fresh mud along the water course sides and muddy water entering Sheep Creek. I find the explanation for this to be that the water flowing out of pond A on Sunday 24th July had so saturated the mud slide between points S-M overnight that mud itself slid across the trench on the lower road down the water course into pond B thereby considerably reducing the capacity of pond B and causing the same to overflow muddy water which had not settled out.

Officer Sitar took samples of water from various points. At a point twenty yards upstream from point C the sample taken and later analysed contained 171 milligrams of suspended solids per litre. The sample taken at point C where the water from the water course was leading into Sheep Creek, contained 863,460 milligrams of suspended solids per litre. This clearly indicated an introduction of a foreign substance to Sheep Creek although the quantity by volume on account of diverse densities would be considerably less than 80% and in the region of 30% according to the evidence of the defence expert witness Neill. I accept his evidence on this point. A sample of water was taken by the witness Wright on the 25th July one mile downstream. This was analysed by an employee of McIntyre in a correct fashion and was found to contain 11 milligrams of suspended solids in one litre. This confirms the evidence of the witness Neill that the mud introduced into the water should quickly disperse in such a turbulent stream of water.

At point C there was a small delta formed by water emerging from the water course. A thin layer of mud covered the rocks on the shore line and some discolouration of water took place. There was speculation by Mr. Neill that some of this may be a quantity of solid mud and although he could not say for sure from the photographs, if it was solid, it would eventually be washed away and would have, if any, a pretty minimal effect on the flow of water in the stream. The delta was not unlike many to be found up and down a stream of this kind and they, according to Mr. Neill, tend to change their nature according to the height of water and rate of flow each year. Mr. Neill described various sediments ranging from fine to coarse as follows:

- Clay
- Silt
- Sand 1-2 mls in diameter
- Gravel 2-60 mls in diameter
- Cobbles 60 - 200 mls in diameter
- Boulders over 200 mls in diameter

Silt and clay would quickly be washed away upon introduction to a stream. He examined the sample taken at point C by Officer Sitar and was of the opinion that it was nearly all silt with a small fraction of very fine sand. He indicated it was consistent with the slurry or sludge that entered pond B. I accept his opinion.

Whilst not binding on this Court, he gave evidence of how the word "debris" is considered in the scientific world. He said the use was not always consistent. It was used by some geologists to mean any break down in the earth's crust. It was more commonly used for more coarse material, such as cobbles, rocks, gravel and extraneous material such as logs and rubbish. He would not personally in a scientific sense call silt and sand "debris".

Constable Olansky of the R.C.M.P. gave evidence that he had caught two fish, a little above point C on Sheep Creek in July 1977. Officer Sitar had once seen a flash in the water which he thought was a fish.

After the discovery of the running of the muddy water into Sheep Creek, I find that all reasonable steps were taken by and on behalf of each accused to bring the flow to a halt.

At no time is there any evidence of any leaves, bark, wood, trees, or organic material flowing from the site of operations into Sheep Creek.

I turn now to rule on the issues I have enumerated above:

1. a) Clearly, McIntyre was carrying on coal mining operations. That was admitted. Can it, however, with relevance to the charge, be said to be carrying on such operations when contracting for the construction of a road or did the involvement of its Chief Engineer Wright in authorizing the reduction of the coffer dam amount of "engaging in coal mining operations"? I think not. It cannot be said that because that was its principal business in the area that every thing done by any employee or agent of the company is an act of "engaging in coal mining operations". To so hold would lead to ridiculous results. I therefore hold that with relevance to the charge before the Court, McIntyre was not carrying on coal mining operations and any such operations carried on by them were irrelevant to the charge.
- b) McIntyre contracted for the construction of the coal haul road with an independent contractor. It reserved to itself the right to approve any alterations or additions to the original plan involving additional expense. By the involvement of Engineer Wright in authorizing the additional work, I find it was "engaged in road construction operations".
- c) The parties have argued the case on the merits and have indicated they want a decision on that basis. I do not think the accused McIntyre would be prejudiced or misled by amendment of the information by deleting from the charge the words "coal mining operations" and substituting therefore the words "road construction operations". I now accordingly make said amendments relative to McIntyre.
2. a) The Crown has argued that because McIntyre were involved in coal mining operations and required a road constructed for that purpose, the engineers who designed the road were engaged themselves in coal

mining operations. I find this a most tenuous argument and reject it out of hand. I find that Underwood was engaged in a "road construction operation" and not a "coal mining operation".

- b) Quite obviously Underwood was engaged in a "road construction operation".
 - c) For the same reasons as those comprised in 1(b) I now amend the Information as it relates to Underwood and in the same manner.
3. a) For the same reasons as those expressed in 2(a), I find Wagro were not involved in coal mining operations.
- b) Quite clearly, Wagro were engaged in a "road construction operation".
 - c) For the same reasons as those expressed in 1(c), I now amend the Information as it relates to Wagro and in the same manner.
4. The argument of each of the defendants of fairly simple and in this respect, it applies also to the issues raised in issue 5. Put simply, the argument is that "road construction" is not of the same *genus* or class as "logging, lumbering and land clearing", all of which involve the cutting and removal of trees. I was referred in a short written brief to a number of cases which I have considered, with the exception of case 9 involving the Town of Stony Plain, this case apparently being under appeal. I was also referred to Driedger on Literary Context and Maxwell on the Interpretation of Statutes.

It was said by Duff J. in *Johnston v. Canadian Credit Men's Trust, Assn.* [1932] S.C.R. 219 at 220, 58 C.C.C. 1, [1932] 2 D.L.R.462:

The rule is a working rule of construction which, properly applied, is of assistance in elucidating the intention of the legislature; although there is too much reason to think that sometimes the result of applying it has been to override that intention.

The rule expressed by Lord Halsbury in *Thames & Mersey Marine Insurance Co. Ltd. v. Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484 (H.L.) is [p. 490] :

that general words may be restricted to the same genus as the specific words that precede them.

In considering the words "other operations" in relation to "logging, lumbering and land clearing" it is appropriate to consider the substance in the section expressed to be the result of such operations, namely "slash, stumps or other debris" again denoting the concept of fallen trees.

I must consider whether Parliament intended that the general words "other operations" and "other debris" should be given a broader significance than

simply being confined to the specific genus of the preceding words and to this end consider the general scope and purview of the Act. Such considerations of s. 33(2) [re-en 1970, C. 17 (1st Supp.), s 3(1)] of the Act reinforces the defence submission as that section clearly excludes any application of the *eiusdem generis* rule by the words

whether the same is of a like character to the substance named in this section or not".

[Ed. note: The fact that these words were removed from the section by the 1970 re-enactment was brought to Porter Prov. J.'s attention; however, he indicated that the change would not have affected the final disposition of the case.]

Such a phrase does not appear in subsections (1) or (3) of s. 33. Subsection 33(2) therefore widens the net to cover any substance whatsoever but then confines it to a substance that is "deleterious to fish". Subsection (1) which relates to the remains of fish and subsection (3) relating to trees and lumber do not place upon the Crown the onus of establishing harm to fish as does subsection (2). Thus the Crown has an easier burden in a prosecution under subsection (1) and subsection (3) and if the words "other operations" or "other debris" were to be interpreted to mean anything, subsection (2) would be entirely superfluous. I can come to no other conclusion but that Parliament intended dead and decaying fish and the products of removing trees from land to be kept out of water frequented by fish regardless of any harm it may do to fish; and any other substance, whatever it may be, would not be prohibited unless harmful to fish.

The interpretation of "other operations" as subsection (3) must therefore be confined to its *genus* that is to operations involving the cutting and removal of trees, shrub and bush from land. If Parliament intended to include building and engineering, it would surely have done so.

Whilst there was some suggestion that some trees had been cleared prior to the construction of the road, such clearing had no relevance to the events leading up to the charge before the Court and I do not take them into consideration. I find the "road construction" being undertaken by the accused companies does not amount to "other operations" within the meaning of that word in section 33(3) of the *Fisheries Act*.

5. For similar reasons, I find that the sediment of clay and sand found in the water running into Sheep Creek did not amount to "other debris" within the meaning of that word. Whilst I would not go so far as defence counsel would urge me and hold that only organic material could be contemplated by this term, the substance must have some connection with "stumps, slash, trees or logs", albeit the dirt and gravel attached to the roots for example. There is nothing to demonstrate any such connection in the evidence before me but rather the evidence is to the contrary.

Even if not confined in this manner by the *eiusdem generis* rule, I would find that the suspended solids in the water in question did not amount to debris. Whilst it is not binding upon me, I am inclined to adopt Mr. Neill's scientific view of debris as being somewhat different to a mud flow and

more of the nature of extraneous material of a coarse nature which would not dissipate quickly in water.

In the Shorter Oxford English Dictionary, "debris" is shown to come from the french word "debriser" meaning to break down or break up. It is said to be the remains of anything broken down and destroyed and in geology any accumulation arising from the waste of rocks; hence any similar rubbish formed by destructive operations.

For these reasons, I find the sediment of sand and clay in question was not debris.

6. Various authorities cited to me by counsel and contained in the Environment Canada binder are conflicting. I have re-read the case of *R. v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591, and take particular note of the words of Mr. Justice Ritchie at page 600 when he says:

In considering the language of the Regulation, s. 3(1)(b) it is significant, though not conclusive, that it contains no such words as "knowingly", "wilfully", "with intent", or "without lawful excuse", whereas such words occur in a number of sections of the Fisheries Act itself which create offences for which mens rea is made an essential ingredient.

This leads me to the conclusion that in using the words "knowingly permit to be put" Parliament intended when the accused was not the actual person "putting" an element of knowledge and *mens rea* to be present. Why else would Parliament include the word "knowingly". Thus it would seem the offence can be committed in one of three ways:

- a) actually putting.
- b) deliberately allowing or instructing to be put.
- c) being recklessly careless as whether or not it was put.

This interpretation is borne out particularly in the case of a corporation by subsection (8) of the section relating to offences committed by an agent or employee of an accused:

In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

I hold, therefore, that the offence is not one of strict liability in respect of any of the accused, but the knowledge and *mens rea* may be imputed to the company if the employee of the company charged with the responsibility on behalf of the company is in the exercise of that responsibility guilty as in

a), b) or c). For example, if X is employed by Y company to carry out certain work and is given an area of responsibility and discretion and he acts in a manner whereby he

- a) deliberately does an act prohibited by law.
- b) deliberately allows or instructs such act to be done
or
- c) is recklessly careless whether or not such an act is done.

all within the scope of his employment, the *mens rea* is attached to the Company unless it can avail itself of the provisions of subsection (8): (see *R. v. Temperman and Sons Ltd.*, [1968] 2 O.R. 174, [1968] 4 C.C.C. 67 (C.A.); 4., and the House of Lords in *Tesco Supermarkets Ltd. v. Nattrass* [1972] A.C. 153 at 171, [1971] 2 All E.R. 127, 5 N.Z.L.R. 357.

7. The contracts between McIntyre and Underwood and between McIntyre and Wagro were not placed before the Court and it is therefore hard to decide the exact relationships.

Wright was clearly an employee of McIntyre.

Morel was clearly an employee of Underwood and although it is apparent that the latter company was to supervise the construction of the road, Morel, who was a Crown witness, said he had no authority to give orders to Wagro but simply make suggestions and work things out by way of discussion.

Piercey was an employee of Wagro.

Wagro was an independent contractor and not an employee or agent of McIntyre or Underwood.

Underwood was clearly not an employee of McIntyre but was it an agent? It is apparent that to the extent that its contract was to design and survey, it would clearly be an independent contractor. According to Mr. Morel, he had no authority to instruct Wagro but he was the liaison between McIntyre and Wagro and to this extent, acted on behalf of McIntyre in passing on any instructions concerning additional work to be done. I find therefore that Underwood was acting as an agent of McIntyre in instructing Wagro to lower the coffer dam and release the water.

8. McIntyre, by virtue of subsection (8) is liable for the wrongful actions, if any, of Engineer Wright, and its agent Underwood. Underwood is responsible similarly for Morel and Wagro is responsible for Piercey. I am satisfied that the intent of Wright was to allow only clean settled water to pass into the Creek from Pond B and, to this extent, he gave proper instructions to Morel. It is not clear and I have a doubt in my mind as to whether or not Morel explained to Wright the full effect of the slide from the embankment of the road. Not being satisfied of this beyond a

reasonable doubt, I proceed on the basis that he was not told. I find therefore that Wright did not knowingly allow the sediment to pass into Sheep Creek, nor was he recklessly careless whether it so passed or not.

Morel was told by Wright of the existence of the settling pond B, knew of the mud slide from the road and that it was proceeding across the lower road particularly when the trench was cut. He made no effort to inspect pond B, advise Engineer Wright or to prevent the continuation of the mud down the hill. To this extent, Underwood are fixed with the knowledge and actions of their employee and McIntyre of their agent unless they can avail themselves of subsection (8).

There is no evidence that Wagro was informed, even of the existence of the settling pond by Morel and thus had no knowledge of that pond. Piercey had some knowledge of the mud and water proceeding down the slope but did not know where it went and made no enquiry. To this extent despite his efforts to separate mud from water, I found he was recklessly careless as to whether or not the mud went to the creek at the bottom of the slope and Wagro are responsible for his actions unless they avail themselves to subsection (8).

Thus the answers to the questions posed are:

Underwood "knowingly did permit"
Wagro "knowingly did permit"
McIntyre "knowingly did permit"

9. I am satisfied that the actions of Engineer Wright were most prudent in the given circumstances and that McIntyre has accordingly established that the offence was committed without its knowledge and that it exercised all due diligence to prevent its commission.

With regard to Underwood, in view of my findings regarding the conduct of Morel in ignoring where the mud was going, failing to advise Wright and not even bothering to acquaint himself with the effect of the mud on the settling pond, I cannot come to the conclusion that Underwood acted with due diligence.

For similar reasons regarding Wagro and Mr. Piercey's conduct in ignoring where the sludge was going, I cannot say that Wagro acted with due diligence.

10. Yes - I accept Constable Olansky's evidence in respect of this.

For the reasons given, I find each of the companies not guilty of the charge.

Porter Prov. J.:(Re; Alberta Water Resources Act)--The three defendant companies in this judgment called McIntyre, Underwood and Wagro respectively, were jointly charged at the outset as follows:

That they "on or about the 25th day of July, A.D. 1977, near Grande Cache, in the Province of Alberta did divert water, namely, the Sheep Creek, by permitting the deposit of material which did interfere with the flow of the water in the same watercourse, except under the authority of the Water Resources Act, its regulations or a licence, interim licence or permit issued under the said Act, contrary to s 6(1) of the aforesaid Act as amended to date."

The wording of this information appeared somewhat duplicitous in that it first charged diversion of water clearly under s 6(1) re-en. 1971, c. 113, s. 4; am. 1975 (2nd Sess.), c. 88, s. 6(a) of the Water Resources Act, R.S.A. 1970, c. 388, and then proceeded to make reference to "interference with the flow of water", words which did not come within the definition of "divert" and were similar to the wording in subs. 6(1)(e). The Crown, when asked to particularize their charge, indicated that it was intended to proceed under s. 6(1) on a charge of diversion and that the words "which did interfere with the flow of water" were surplusage and could be deleted. The defendants, through their respective counsel, agreed with this course of action and the words were accordingly struck out. The charge as amended then read as follows:

That they "on or about the 25th day of July, A.D. 1977, near Grande Cache in the Province of Alberta did divert water, namely, the Sheep Creek, by permitting the deposit of material, in the same watercourse, except under the authority of the Water Resources Act, its regulations or a licence, interim licence or permit issued under the said Act, contrary to s. 6(1) of the aforesaid Act as amended to date."

The evidence in this trial consisted of all the evidence in the trial under the Fisheries Act, R.S.C. 1970, c. F-14, being read into the record by agreement, and I make the same findings of fact. In addition, the witness Neill was called by the defence. He dealt with his understanding of the term "flow of water" which I found most helpful. He indicated that anything introduced across a stream of water would increase the velocity in the other parts of the cross-section of the stream. He was unable to say how far, if at all, the delta extended into the stream or how deep it was. At the worst, from what he could see in the photographs, he was of the opinion that any effect in the rate of velocity or the distribution of velocity of the water would be pretty insignificant. That side of the stream being very much shallower than the far side, he was of the view that even if 20 per cent in area of the shallow side was cut off the effect on the velocity would not be that great. He agreed that if the delta had any depth it would have some effect on the distribution of flow. He indicated again that these deltas constantly change naturally.

The word "divert" has three meanings under s. 2(1)6(ii) [re-en. 1971, c. 113, s. 2] of the Act: to do any act that has the effect of, (a) altering the flow of water; (b) changing the location of water; (c) changing the course of flow of water.

Item (a) obviously applies to the rate of flow of the water and I am quite satisfied that nothing here by way of the defendant companies changed a set quantity of water passing down Sheep Creek in a set time.

Regarding item (b), quite clearly the location of the watercourse was not changed.

Item (c) must refer to the physical path of the water along the same watercourse, i.e., the distribution of the velocity across the stream, and is perhaps best explained by an example. If a brick wall were built three-quarters of the way across the stream, then there would be a greater and faster flow rate through the remaining quarter and nothing through the three-quarters. Thus, the geography of the flow would change.

In order for the Crown to succeed under item (c) alone, they must establish beyond a reasonable doubt that the course of the water flow was "changed". To do this, the Crown would have to do one of two things: (i) show what was there before and after the event; or (ii) show quite clearly the introduction of something which quite obviously from the evidence was not there before and which had the effect of change.

The Crown clearly, as Mr. Thompson urged in argument, has not succeeded in showing what the situation was before. There was no such evidence, as nobody inspected it before.

It is obvious that some mud, consisting of silt and sand, was introduced which was not there before. The court cannot however come anywhere near to the conclusion, let alone be satisfied beyond a reasonable doubt, that such introduction of mud obviously had the effect of change. At best, there was speculation as to what this mud did when it entered Sheep Creek, Mr. Neill's evidence being based to a great extent on hypothetical questions. He repeated more than once that he could not tell whether the muddy colour in the photographs at point C was solid or just floating in the water. None of the other witnesses were of any greater help in this respect. At best the court might speculate that a small part of the mud or sludge was sitting on the bottom of the stream bed and frankly I am not prepared to speculate in that manner and find that I am not satisfied that any of the mud entered the water and remained in a solid enough state to obviously effect change.

Even if I had come to a contrary conclusion, namely, that the whole of the brown area in the stream at point C was solid sludge, I would consider the provisions of the "de minimis non curat lex" rule. Mr. Kilgour conceded that, on the basis of Mr. Neill's evidence, the holding of a stick or piece of wood in the water would alter the course of the flow and that this would be covered by the rule. It is a question of where the line is to be drawn. In considering the delict aimed at by the Act, one cannot but come to the conclusion that it deals with the development, conservation and management of water in the province and the issue of permits and licences to those who seek by building, engineering or otherwise to interfere with such. Section 6(3) [en. 1975 (2nd Sess.), c. 88, s 6(b)] deals with the rectification of contravention of the whole section and refers to "fill or otherwise dam or block any excavation, ditch or canal in respect of which no permit ..."

The words "undertaking" and "works" are extensively defined and refer to matters of some considerable moment. The whole tenor of the Act concerns works and undertakings which would obviously have a serious effect on any stream or watercourse and I am not of the view that it was intended by the legislature to cover every minor eventuality which might technically be said to change marginally the flow of water. A different consideration would apply if a goodly part of a watercourse were affected by a large dump of material when a person standing on the bank looking

at the river might say: "well, that has certainly changed the characteristic of the flow at this point", but not, surely not, when we are considering a situation where the rate could hardly even be measured scientifically and at its worst appeared to be no less than what nature might do at any time under normal conditions.

In conclusion therefore, I find the Crown has not proved that anything was done by any of the defendants which had the effect of altering the flow of water, or changing the location of the water or changing the course of the water. Even if there was any such alteration or change, I find that it would have been of so little import that it was inconsequential and did not create a situation contemplated by the statute.

I find each defendant company not guilty.

RE FOREST PROTECTION LIMITED AND GUERIN

Supreme Court of New Brunswick-Queen's Bench Division, Stratton, J., Saint John, February 17, 1978

Abuse of Process - Whether the Court has a discretionary power to control its own proceedings.

Budworm Spray Program - New Brunswick's northern forests infested - Aerial spraying since 1953 to control pests.

Certiorari - When this extraordinary remedy lies to control certain actions and jurisdiction.

Constitutional Law - Whether the federal Pest Control Products Act and Fisheries Act are ultra vires the province's domain.

Crown Servant - Whether a corporation is a servant of the Crown or an independent contractor - Special Act and Letters Patent corporations.

Fisheries Act, R.S.C. 1970 c. F-14, s. 33(2), as amended - Deposition of deleterious substance in water frequented by fish.

Jurisdiction - Whether Provincial Court has jurisdiction to deal with charges layed under the federal Pest Control Products Act and Fisheries Act.

Pest Control Products Act, R.S.C. 1970, c. P-10 s. 3(1) - Manufacture, storage, display, distribution or use of any control product under unsafe conditions.

Regulation SOR-72-451, s. 44(1) - Authorized under the Pest Control Products Act - Use of a control product consistent with instructions on label.

Forest Protection Limited is a Crown corporation with its sole object and purpose being the protection of forests. The applicant corporation since 1952, except 1959, carried out an annual aerial spray program directed against the spruce budworm infestation of the forests in the northern part of New Brunswick. An agreement was entered into from 1953 to 1975 between Forest Protection Limited and the provincial government of New Brunswick which authorized the undertaking and management of spraying operations. The spray programs for 1975 and 1976 were approved separately. In 1976 a provincial Order-in-Council was issued and a Letter Agreement was executed giving approval to aerial spraying in 1976. This was done in response to the decision in *Bridges Brothers Limited v. Forest Protection Limited* (1976), 14 N.B.R. (2d) 91. The applicant, Forest Protection Limited, does not plead to the summons, but challenges the jurisdiction of the Provincial Court Judges to try the offences charged.

On applications by Forest Protection Limited for orders of *certiorari* to quash 30 summonses and for orders of *prohibition* to prohibit any further Provincial Court proceedings with respect to the summonses or informations. The applications were made on the grounds that as a provincial Crown corporation, Forest Protection Limited was immune from the Provincial Court jurisdiction, that s. 33(2) of the

Fisheries Act, s. 3(1) of the *Pest Control Products Act*, and the regulations made under the *Pest Control Products Act* are *ultra vires* the Parliament of Canada, that s. 33(2) of the *Fisheries Act* does not apply to areas other than the sea, and that the laying of a great number of informations with respect to the same matter is an abuse of the Courts process.

Held: The applications are dismissed with costs to the informant - respondent.

Certiorari and *prohibition* are available to the applicant as the challenge to jurisdiction was taken prior to plea. *Certiorari* lies to control the action of inferior jurisdictions whenever there has been a failure, absence, excess or an abuse of jurisdiction. *Prohibition* lies to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction.

Forest Protection Limited, a letters patent corporation, with much control vested in various departments of the provincial government, is nevertheless a commercial corporation which acts on its own behalf. As an independent contractor and not a Crown agent, Forest Protection Limited is not immune from prosecution.

It was conceded that the *Pest Control Products Act* was *intra vires* the Parliament of Canada. The *Fisheries Act* is also *intra vires* the Parliament of Canada as it is within the competence of Parliament to regulate, protect and preserve the fisheries, which also allows for the prohibition of the deposit of deleterious substances in waters frequented by fish. Section 33(2) of the *Fisheries Act* applies to waters including all waters in the fishing zones of Canada, which zones are not restricted to the sea.

The Court has no discretionary power to stay duly instituted proceedings because the prosecution is considered oppressive.

The Provincial Court has jurisdiction to deal with all the summonses and informations layed against Forest Protection Limited.

On appeal to the New Brunswick Court of Appeal.

(Headnote from (1978), 7CELR93.)

Levi E. Clain, Kenneth B. McCullough, for the applicant,
A.G. Warwick Gilbert, for the informant-respondent.

Stratton, J.:--These are three applications by Forest Protection Limited, ("F.P.L."), for orders of *certiorari* to remove into this Court and quash a total of thirty summonses issued to it by Judges of the Provincial Court of New Brunswick consequent upon informations laid before that Court by Lucretia J. Guerin, President, The Concerned Parents Group Inc., ("Mrs. Guerin") and for orders of *prohibition* to prohibit the Judges of the Provincial Court of New Brunswick from any further proceedings with respect to the summonses or information.

THE OFFENCES CHARGED

The summonses herein charge F.P.L. with offences

(a) Under section 33(2) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, which provides as follows:

33(2) Subject to subsection (4), [not here relevant], no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

(b) Under section 3(1) of the *Pest Control Products Act*, R.S.C. 1970, c. P-10, which provides as follows:

3(1) No person shall manufacture, store, display, distribute or use any control product under unsafe conditions.

(c) Under section 44(1) of *Regulation SOR-72-451* of the *Pest Control Products Regulations* dated November 10, 1972, issued and authorized under the *Pest Control Products Act*, which provides as follows:

44(1) No person shall use a control product in a manner that is inconsistent with the directions or limitations respecting its use shown on the label.

THE GROUNDS OF APPLICATION

The first application was made upon the following grounds:

(1) The applicant Forest Protection Limited is and has been at all times a servant of the Crown in right of the Province of New Brunswick and in particular during the months of May and June in the years 1975 and 1976, and as such it is not subject to proceedings under and by virtue of the Criminal Code, R.S.C. 1953-54, C. 51 and amendments thereto, and it is immune to prosecution under the Fisheries Act, R.S.C. 1970, C. F-14, and amendments thereto, and the Pest Control Products Act, R.S.C. 1970, C. P-10, and amendments thereto, and Judge Frederic Taylor of the Provincial Court therefore exceeded his jurisdiction in issuing the summonses referred to herein and is without jurisdiction to conduct any further proceedings in relation thereto.

(2) Subsection (2) of Section 33 of the Fisheries Act, R.S.C. 1970, Chapter F-14, as amended, is ultra vires the Parliament of Canada insofar as it is legislation relating to the exercise of proprietary rights by persons within the Province of New Brunswick over the internal waters of the Province of New Brunswick, therefore, the said subsection does not create an offence and Judge Frederic Taylor of the Provincial Court therefore exceeded his jurisdiction in issuing the summonses referred to herein and is without jurisdiction to conduct any further proceedings in relation thereto.

(3) Subsection (1) of Section 3 of the Pest Control Products Act, R.S.C. 1970, Chapter P-10, as amended, is ultra vires the Parliament of Canada insofar as it is legislation relating to the use of a control product in the management of public lands within the Province of New Brunswick and of the timber and wood thereon and on other property within the Province, therefore, the said subsection does not create an offence and Judge Frederic Taylor therefore exceeded his jurisdiction in issuing the summonses referred to herein and is without jurisdiction to conduct any further proceedings in relation thereto.

(4) The Pest Control Products Act, R.S.C. 1970, Chapter P-10, as amended, is ultra vires the Parliament of Canada insofar as it authorizes the Governor in Council to make regulations relating to the regulating or prohibiting of the use of a control product in the management of public lands within the Province of New Brunswick and of the timber and wood thereon and on other property within the Province and therefore a violation of the Act or of a regulation relating to such use does not create an offence and Judge Frederic Taylor of the Provincial Court therefore exceeded his jurisdiction in issuing the summonses referred to herein and is without jurisdiction to conduct any further proceedings in relation thereto.

(5) Subsection (2) of section 33 of the Fisheries Act, R.S.C. 1970, Chapter F-14 as amended, prohibits deposits of deleterious substances of any type in water frequented by fish or in any place under any circumstances where such deleterious substance of any other deleterious substance that results from the deposit of such deleterious substance may enter any such water. Subsection (11) of section 33 defines "water frequented by fish" as including all waters in the fishing zones of Canada. Subsection (1) of section 4 of the Territorial Seas and Fishing Zones Act, R.S.C. 1970, Chapter T-7, as amended, provides that:

the fishing zones of Canada comprise such areas of the sea adjacent to the coast of Canada as may be prescribed by the Governor in Council pursuant to sub-section 5.1(1).

The waters referred to in the various summonses as being waters into which the deleterious substance has been deposited or into which the deleterious substance may enter are not areas of the sea and therefore the said summonses do not disclose an offence known to law and Judge Frederic Taylor therefore exceeded his jurisdiction in issuing the summonses referred to herein and is without jurisdiction to conduct any further proceedings in relation thereto.

The second application repeated grounds 1 to 4 of the first application but added a new ground 5 as follows:

(5) The laying of nineteen more informations in addition to the previous ten already laid by the same informant against Forest Protection Limited under the same Acts in the circumstances, amounts to an abuse of the process of the Court in that the informant and the Concerned Parents Group Inc., which she represents, are endeavouring to use the Criminal Court to achieve a civil and/or political object and as such should not be tolerated.

The third application repeated grounds 1 and 3 of the first application and included as ground 3 the following:

The laying of this additional information in addition to the previous twenty-nine (29) already laid by the same informant against Forest Protection Limited under the same Acts in the circumstances amounts to an abuse of the process of the Court in that the informant and the Concerned Parents Group Inc., which she represents, are endeavouring to use the Criminal Court to achieve a civil and/or political object and as such should not be tolerated.

THE FACTUAL BACKGROUND

The forests of New Brunswick have become infested with the spruce budworm, and insidious insect which defoliates and kills firs and spruce trees. In the spring of 1952, New Brunswick International Paper Company Ltd. and the Government of the Province of New Brunswick jointly carried out an experimental aerial spraying program over a limited area of forest to determine its effect upon the spruce budworm; it was successful. Subsequently, representatives of Government and the forest industry met and decided to incorporate a private company to undertake the organization and management of a program of aerial spraying of insecticide to protect the forests of New Brunswick.

F.P.L. was then organized; it was incorporated by Letters Patent dated September 6, 1952; it has as its sole object and purpose the protection of the forests. F.P.L. is a standard private trading corporation with a capital stock of \$5,000.00 divided into 500 common shares of the par value of \$10.00 each. Two hundred shares have been issued; in 1975, 180 of the issued shares were registered in the name of Her Majesty The Queen and in 1976, this increased to 182 shares. At the present time, of the remaining 18 issued shares, 17 are held by nine participating pulp and paper companies and one share is registered in the name of F.P.L.

Formerly, each of the nine pulp and paper companies had two representatives on the board of directors of F.P.L.; currently, there are 22 directors but only 9 of these now represent the pulp and paper companies; the balance are either Ministers of the provincial Crown or representatives of provincial government departments, principally the Department of Natural Resources. The president of F.P.L. is the Deputy Minister of Natural Resources; its chairman and secretary are employed and paid by the latter department. Other officers and employees of F.P.L. during the years 1975 and 1976 included employees of private industry paid by the individual companies from which they came, employees of the government of New Brunswick paid by the government as well as employees paid by F.P.L.

F.P.L. has, since 1952, (except for 1959), carried out an annual spray program in May and June of each year. The "Spray Program" for each year results from a number of contributing facts and factors; in the preceding fall, the area to be sprayed is first determined by defoliation and budworm egg mass surveys conducted by government agencies; as the result of these surveys, a proposed spray map is prepared depicting the areas of the province to be sprayed, regardless of ownership; the insecticide to be used is selected and the number of its applications and its dosage is determined. This spray program is then submitted to the federal Department of Agriculture which receives advice on the program from experts in related fields employed by the various

departments of the federal and provincial governments who form an interdisciplinary committee. The approval of the federal Department of Agriculture is received each year before the spray program is put into effect. The spray program is also presented to the board of directors of F.P.L.; the approval of the board is contingent upon the approval of the Deputy Minister of Natural Resources who receives his authorization from the Minister of Natural Resources.

The participating pulp and paper companies contribute one-third of the costs of the annual spray program and the province contributes two-thirds, although the province recovers one-half of its contribution from the federal government. F.P.L. makes no profit nor does it incur any loss. Its expenditures are merely met by the participating companies and the province in the proportions indicated.

Section 3 of the *Forest Service Act*, R.S.N.B. 1973, c. F-23, (formerly R.S.N.B. 1952, c. 93, s. 3) is here relevant; it provides as follows:

3(1) The Lieutenant-Governor in Council shall maintain a forest service for the purpose of

(a) protecting the forests from fire, insects and diseases,

.....

3(2) Subject to the approval of the Lieutenant-Governor in Council, the Minister may enter into agreements with the government of Canada or with any person to undertake and carry out operations for protection the forests from fire, insects, and disease; and the Minister may delegate to such party such authority as may be deemed necessary for the effectual carrying out of the agreement.

Section 3(2) was cited by the province as authority to pass Order-in-Council No. 53-376, dated May 7, 1953, which authorized the Minister of Lands and Mines, (now Natural Resources), to execute an agreement with F.P.L. by the terms of which the provincial government engaged F.P.L. to undertake and manage an aerial spraying operation directed against the spruce budworm infestation of the forests in the northern part of New Brunswick and undertook to pay two-thirds of the amount of the expenditures of the aerial spraying operation. From 1953 to 1975 this agreement was continued from year to year and the annual estimated cost of the government's share of the program was included in the estimates for the Department of Natural Resources and approved by the Legislature of the Province of New Brunswick.

The spray programs for the years 1975 and 1976 were submitted to the federal Department of Agriculture and approved. They were also approved by the board of directors of F.P.L. which engaged private contractors to provide the planes and pilots to carry out the aerial spraying operations; these latter contractors were engaged by an agreement providing for the approval of the government of New Brunswick. The main estimates for the Department of Natural Resources for the fiscal years commencing April 1, 1975 and April 1, 1976, together included sums exceeding \$10,000,000.00 for forest insect control which were approved by the New Brunswick Legislature and actually paid by the Department to F.P.L. for the programs which were carried out.

Because of the decision of Mr. Justice Stevenson in *Bridges Brothers Ltd. v. Forest Protection Ltd.* (1976), 14 N.B.R. (2d) 91, the board of directors of F.P.L. sought and obtained from the provincial government an Order-in-Council and Letter Agreement. The Order-in-Council is numbered 76-335 and is dated May 12, 1976; it provides as follows:

1. Pursuant to section 3 of the Forest Service Act, the Lieutenant-Governor in Council gives his approval

(a) for the aerial spraying for spruce budworm control in 1976;

(b) for the proposed aerial spray program of approximately 9.6 million acres; and

(c) for the Minister of Natural Resources to enter into an agreement with Forest Protection Limited to carry out the proposed spraying operations.

2. The province agrees to indemnify Forest Protection Limited with respect to claims for damages for injury to the health of any person directly caused by the application of chemical insecticides used for killing spruce budworms in the spray program for 1976.

3. The province's agreement to indemnify shall not apply

(a) to lands owned or controlled by the sponsors of the spray program;

(b) unless the chemical insecticide is mixed in the proper proportions and in accordance with any existing licences, regulations, instructions or requirements;

(c) with respect to the spraying of private lands contrary to any instructions which may be given by the Minister of Natural Resources from time to time;

(d) in the event the application of the chemical insecticide is not carried out in a proper manner in accordance with reasonable standards of competence and safety or not to knowingly cause harm to the health of any persons.

The Letter Agreement is upon the letterhead of the Minister of Natural Resources and is as follows:

P.O. Box 6000.
Fredericton, N.B.
E3B 5H1

May 17, 1976.

Mr. H.J. Irving,
Managing Director,
Forest Protection Limited,
P.O. Box 1030,
Fredericton, N.B.
E3B 5C3

Dear Mr. Irving:

Pursuant to Order-in-Council of the Lieutenant-Governor under May 12, 1976 and numbered 76-335, I hereby authorize Forest Protection Limited to undertake and carry out the proposed 1976 aerial spray program for spruce budworm control of approximately 9.6 million acres of the forests in New Brunswick.

Further, I hereby delegate the Forest Protection Limited, by the power vested in me under the Forest Service Act, whatever authority is necessary for you to effectually carry out the above program.

Please endorse the original and carbon copy of this letter by your authorized representative signifying your consent to this agreement.

(Sgd.) Roland C. Boudreau
ROLAND C. BOUDREAU
MINISTER OF NATURAL RESOURCES

I, H.J. IRVING, President of Forest Protection Limited, hereby accept this agreement on behalf of the Company.

(Sgd.) H.J. Irving
H.J. IRVING
PRESIDENT

F.P.L. did not plead to the summonses issued herein against it and seeks, by these applications, to challenge the jurisdiction of the learned Provincial Court Judges to try it for the offences which are charged.

DO CERTIORARI AND/OR PROHIBITION LIE

It is generally recognized that *certiorari* will lie to control the action of inferior jurisdictions whenever there has been a failure, or absence or an excess or an abuse of jurisdiction.

Mr. Salhany writes that

certiorari is most frequently sought where the applicant complains that the inferior tribunal was improperly constituted or acted in excess or abuse of its jurisdiction. The applicant in such instances is not required to wait until the proceedings have been terminated but may apply as soon as the tribunal exceeds its jurisdiction. If the act alleged to be in excess of the tribunal's jurisdiction is not patent on the face of the record, affidavit evidence will be admissible to show this defect.

See Salhany, *Canadian Criminal Procedure*, second edition, 1971, p. 295.

In *R. v. Robinson* (1970), 97 C.C.C. 160 Mr. Justice MacFarlane of the British Columbia Supreme Court concluded that *certiorari* does lie when there is clear absence of jurisdiction and the question is whether legislation under which a charge is laid is *ultra vires*.

Mr. Justice Martland, speaking for the majority of the Supreme Court of Canada in *Sanders v. The Queen* (1969), 8 C.R.N.S. 345 said this at pages 377-378 of the report:

A person who challenges the jurisdiction of a tribunal which proposes to try him can take objection to the jurisdiction and refuse to plead, in which event *certiorari* is available to him. But, if he does plead, and the case then proceeds to a trial of the merits, and if he has a right of appeal, his challenge to the jurisdiction can then only be made by way of appeal.

Where *certiorari* is sought on the ground of absence or excess of jurisdiction, extraneous evidence of these matters will be admissible, and indeed necessary, if they are not apparent on the face of the record: see *Halsbury*, 3rd Edition, volume 11, page 75 and *Perepolkin v. Superintendent of Child Welfare* (1957), 118 C.C.C. 263 (C.A.).

The function of *prohibition* is to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction: see *Re Clifford and O'Sullivan*, [1921] 2 A.C. 570. *Prohibition* will issue only in cases of want or excess of jurisdiction: see *R. v. Phillips* (1906), 11 O.L.R. 478; *R. v. Spence* (1919), 45 O.L.R. 391 (C.A.). *Prohibition* is discretionary only where the defeat of jurisdiction is not apparent on the face of the proceedings and not where there is a clear absence of jurisdiction: see *R. v. Thompson* (No. 2) (1946), 86 C.C.C. 206.

Prohibition upon the ground of loss of jurisdiction, or upon the ground of unconstitutionality as a defence in law on the merits, - as to which see *LeTourneau, The Prerogative Writs in Canadian Criminal Law and Procedure*, Butterworths, 1976, pp. 157-159, - will lie to restrain prosecutions under a statute which is inoperative; see *Re Dodd* (1956), 116 C.C.C. 334; or *ultra vires*: see *Vaillancourt v. City of Hull*, [1949] Que. K.B. 120; *R. v. Deacon*, [1970] 1 C.C.C. 305 and *Re Thodas* (1970), 10 C.R.N.S. 290 (C.A.). And, as in the case of proceedings by way of *certiorari*, so on an application for *prohibition* is affidavit evidence receivable to complete the record: see *R. v. Prokipchuk and R.* (1974), 18 C.C.C. (2d) 423.

The question of jurisdiction is fundamental both in proceedings by way of *certiorari* and by *prohibition*. As to whether *certiorari* or *prohibition* is the proper remedy, Lord Atkin, in *R. v. Electricity Commissioners*, [1924] 1 K.B. 171 (C.A.), said:

I can see no difference in principle between certiorari and prohibition except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in the final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction.

In these present applications, it is the submission of F.P.L. that it is a servant of the Crown and is therefore not subject to proceedings under the *Criminal Code*, the *Fisheries Act* or the *Pest Control Products Act*, that the latter two acts are *ultra vires* the Parliament of Canada, and that in consequence thereof the learned Provincial Court Judges exceeded their jurisdiction in issuing the summonses herein and are without jurisdiction to conduct any further proceedings in relation thereto. This challenge to jurisdiction was taken by F.P.L. before plea. Accordingly, upon the authority of the decisions cited, I hold that either of the extraordinary remedies of *certiorari* or *prohibition* are available to the applicant and that affidavit evidence is admissible to bring to the notice of the Court the facts constituting the grounds of the applications.

CROWN SERVANT

The principal thrust of the argument, both in the extensive briefs filed by counsel and in their oral argument, was directed to the issue as to whether or not F.P.L. is a Crown Servant and thereby immune from prosecution.

It is the submission of counsel for the applicant that the facts disclosed in the several affidavits filed in a support of their applications establish that F.P.L. is controlled by the government of New Brunswick. In their brief they cite the following indicia as supporting this submission:

1. *Of the 200 issued shares of Forest Protection Limited, 180 or more are held in the name of Her Majesty The Queen or in the name of one of her appointees, the remaining shares being distributed amongst appointees of the participating private companies who serve as directors;*
2. *The Deputy Minister of Natural Resources has always been a Director of Forest Protection Limited and has always acted as spokesman for the government of New Brunswick on the board (the Minister of Natural Resources now sits as a director together with four other Ministers of the Crown);*
3. *At the annual meetings of Forest Protection Limited since its incorporation, the Deputy Minister of Natural Resources as proxy for Her Majesty, The Queen, casts her votes;*
4. *The sole object and purpose of Forest Protection Limited, and the very reason for its existence, is to protect the forests of New Brunswick;*

5. *Forest Protection Limited was incorporated as a private company rather than delegate the task of forest protection to a department of government for reasons of economy and efficiency;*
6. *Forest Protection Limited does not seek or realize a profit but is merely reimbursed for the actual costs of its operations;*
7. *Each year the Legislature of the Province of New Brunswick appropriates funds for the express purpose of paying the province's two-thirds share of the actual cost of the spruce budworm spray program to be conducted by Forest Protection Limited for that year, and in the debate on these appropriations the spray program proposed for that year was made available to the members of the Legislature;*
8. *Since the incorporation of Forest Protection Limited, two-third of the actual cost of the spray program for each year has in fact been paid by the Department of Natural Resources or its predecessor;*
9. *Under Section 3(2) of the Forest Service Act, the Lieutenant-Governor in Council approved of the Minister of Natural Resources engaging Forest Protection Limited to conduct the spray program, and the Minister delegated to Forest Protection Limited such authority as was necessary to effectually carry out the program;*
10. *The Minister of Natural Resources expressly approved the spray program for each year and this approval was conveyed to the board of directors of Forest Protection Limited by his Deputy Minister;*
11. *That the approval of the spray program for each year by Forest Protection Limited was in fact contingent upon the approval of the government of New Brunswick as conveyed by the Deputy Minister of Natural Resources;*
12. *The spray program for each year is conducted by Forest Protection Limited in accordance with the approval of its board of directors and the Minister of Natural Resources, and subject at all times to the direct control of the government of New Brunswick;*
13. *The land to be included in the spray program is initially determined by surveys conducted by government agencies;*
14. *The land is included in the spray program regardless of ownership;*
15. *As part of their duties, employees of the government of New Brunswick serve as directors and officers and employees of Forest Protection Limited;*
16. *Private contractors are engaged by Forest Protection Limited to provide the planes and pilots to conduct the aerial spraying operations by an agreement subject to the approval of the government of New Brunswick.*

It is the further submission of counsel for the applicant that the nature and degree of control which the government of New Brunswick exercises over F.P.L. is the

determinant factor in establishing it to be a Crown Servant. This, they contend, is the applicable principle to be abstracted from a long line of decisions culminating in *Mellenger v. New Brunswick Development Corporation*, [1971] 2 All E.R. 593, a decision of the English Court of Appeal, and in *Westeel-Rosco Limited v. Board of Governors of South Saskatchewan Hospital Center et al.*, [1977] 2 S.C.R. 238, a decision of the Supreme Court of Canada.

In the *Mellenger* case, the New Brunswick Development Corporation objected to the issue of a writ against it on the ground, *inter alia*, that the Corporation was an arm of the government of the province of New Brunswick and could not be sued in England. Lord Denning, in holding this ground valid, said at page 596:

The next point is whether the Corporation can avail itself of the doctrine of the sovereign immunity. If it is part and parcel of the government of New Brunswick - so much so as to be identified with it like a government department - it can clearly claim immunity. For this purpose we must turn to the statute which set it up. It was established by the New Brunswick Development Corporation Act of 11th April 1959. Clause I provides:

There is hereby constituted on behalf of Her Majesty in right of New Brunswick a body corporate under the name of The New Brunswick Development Corporation.

Then follow clauses which show the close connection of the Corporation with the government. The Minister of Industry is an ex officio director. The other directors are appointed by the Lieutenant-Governor in Council. There is no issued capital.

*It has no stocks or shares. Its principal power is: '... to assist, promote, encourage and advance the industrial development, prosperity and economic welfare of the province.' It is true that there is a later clause which gives the Corporation power, subject to the approval of the Lieutenant-Governor in Council, 'to carry on any business of an industrial, commercial or agricultural nature'. But the evidence shows that the Corporation has never exercised this latter power. It has never pursued any ordinary trade or commerce. All that it has done is to promote the industrial development of the province in the way that a government department does, such as the Board of Trade in England. In the circumstances it seems to me that the Corporation is really part and parcel of the government on New Brunswick. The very words that it is constituted 'on behalf of Her Majesty in right of New Brunswick' bring it within the words which were used in *Tamlin v. Hannaford*, [1949] 2 All E.R. 327 at 329, [1950] 1 K.B. 18 at 25 per Denning L.J.:*

When Parliament intends that a new corporation should act on behalf of the Crown, it, as a rule, says so expressly ...

On this ground alone, I would hold that the Corporation is in the same position as a government department, and is entitled to plead sovereign immunity.

Apart, however, from the statute, the functions of the Corporation, as carried out in practice, show that it is carrying out the policy of the government of New

*Brunswick itself. It is its alter ego. If and insofar as the Corporation played any part in this case, it was identified with the government. The evidence shows that the Prime Minister of the province played a leading part. The Corporation itself has never been legally involved in the transaction. It was not the owner of the land on which the factory is being built. The Airscrew Weyroc people bought it from some private owner. The Corporation has made no contract with anyone about these transactions. But the government of New Brunswick itself has done so. It agreed to guarantee a bond issue if required. There is no single point in which the Corporation itself has been involved. It was just the alter ego of the government, and can claim sovereign immunity. see: *Rahimtoola v. HEH The Nizam of Hyderabad* ([1957] 3 All E.R. 441 at 445, [1958] A.C. 379 at 393) per Viscount Simonds.*

It is clear, I think, from a careful reading of the judgment of Lord Denning in the *Mellenger* case and that of Lord Salmon, which is to the same effect, that their Lordships, in arriving at the conclusion which they did, relied upon the fact that the Development Corporation was established by a Special Act of the New Brunswick Legislature which constituted the Corporation a body corporate "on behalf of Her Majesty in right of New Brunswick", and that the Corporation, although authorized to do so, never carried on any ordinary trade or commerce. Moreover, Lord Denning was careful to draw specific attention to his judgment in *Rahimtoola v. H.E.H. The Nizam of Hyderabad, et al.*, [1957] 3 All E.R. 441 at 460 wherein he held that "a separate legal entity which carries on commercial transactions for a state was an agent and not an organ of the government" and is not entitled to plead sovereign immunity.

In the *Westeel-Rosco* case, an unpaid sub-contractor claimed to be entitled, under the Saskatchewan *Mechanics' Lien Act*, to a charge upon a holdback fund retained by a Hospital Board in connection with the construction of a new hospital. The Hospital Board contended it was an agent of the Crown and therefore not bound by the provisions of the *Mechanics' Lien Act*. It was however the unanimous decision of the Supreme Court of Canada that the Board was not in fact a Crown agent and therefore the provisions of the Act applied to it. Mr. Justice Ritchie, who delivered the judgment of the Court, said, at pages 249-250:

*Whether or not a particular body is an agent of the Crown depends upon the nature and degree of control which the Crown exercises over it. This is made plain in a paragraph in the reasons for judgement of Mr. Justice Laidlaw, speaking on behalf of the Court of Appeal for Ontario in *R. v. Ontario Labour Relations Board, Ex. p. Ontario Food Terminal Board*, ((1963), 38 D.L.R. (2d) 530), at p. 534, where he said:*

It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with certainty whether or not an entity is a Crown agent. The answer to that question depends in part upon the nature of the functions performed and for whose benefit the service is rendered. It depends in part upon the nature and extent of the powers entrusted to it. It depends mainly upon the nature and degree of control exercisable or retained by the Crown.

Mr. Justice Ritchie, in the course of his judgment, reviewed the provisions of the Special Act which constituted the Hospital Board a body corporate and noted that its

seven member Board was appointed by the Lieutenant-Governor in Council and was endowed with wide powers for the construction and administration of the hospital including the power to manage, invest and expend all moneys, and manage all property belonging to the hospital. Additionally, the Board was given the power to make by-laws, rules or regulations relating to the operation, administration and management of the hospital and to borrow on security such sums of money as may be required to meet operating expenses. The act of incorporation further provided that the Legislature could appropriate funds for the maintenance of the hospital and expenses of the Board and that there was to be an annual audit by the provincial auditor and an annual report by the Board to the Minister of National Health on its finances and estimates of the next year's expenses. Although the hospital was to be built and operated out of public funds, Mr. Justice Ritchie stressed the fact that the Board had very wide discretionary powers of spending and of conducting its own affairs *within the limits of its statutory powers* (emphasis added) and concluded, at page 253:

In my opinion, as I have indicated, the powers with which the Board is endowed are far removed from those of a Crown agency which is subject at every turn to the control of the Crown in executing its powers ...

It is to be noted that in *Westeel-Rosco*, as in *Mellenger*, the Courts were concerned with the nature and degree of control exercised by governments in respect of statutory corporations, that is to say, corporations incorporated and empowered by Special Acts of the governments concerned. Even in such circumstances, the judgments make clear, there can be serious question as to whether or not the very creature of government is, in fact, its agent. But that is not the situation we have here; F.P.L. is not a Special Act corporation; it is a letters patent company with share capital; it possesses the usual powers and has enacted the by-laws of a normal trading company; it owns assets in its own right and carries on trade and commerce; accordingly, in my opinion, different considerations apply to it. The law applicable here, in my view, is succinctly and accurately stated in *Halsbury* 4th Edition, Volume 9, page 722, in the following terms:

In the absence of any express statutory provision, the proper inference, at any rate in the case of a commercial corporation, is that it acts on its own behalf, even though it is controlled to some extent by a government department. The fact that a minister of the Crown appoints the members of such a corporation, is entitled to require them to give him information and is entitled to give them directions of a general nature does not make the corporation his agent. The inference that a corporation acts on behalf of the Crown is more readily drawn where its functions are not commercial but are connected with matters, such as the defence of the realm, which are essentially the province of government.

The decision of the English Court of Appeal in *Tamlin v. Hannaford*, [1949] 2 All E.R. 327 is authority for the principle so stated. An application of the principle in Canada is contained in the decision of the Quebec Court of Appeal in *North and Wartime Housing Ltd. v. Madden, et al.*, [1944] 4 D.L.R. 161. Moreover, and importantly, this principle was cited and applied by Mr. Justice Stevenson in respect of F.P.L. in *Bridges Brothers Ltd. v. Forest Protection Ltd.* (1976), 14 N.B.R. (2d) 91 at page 137.

Upon the whole of the material before me, I am satisfied and find, as did Mr. Justice Stevenson, that F.P.L. is an independent contractor of the Crown and that it is not immune from prosecution.

CONSTITUTIONAL ISSUES

During the argument, counsel for F.P.L. conceded that grounds 3 and 4 of the first application were no longer in issue and that the *Pest Control Products Act* was *intra vires* the Parliament of Canada. It was however their submission that section 33(2) of the *Fisheries Act* was *ultra vires* as legislation relating to the exercise of proprietary rights by persons within the province of New Brunswick over the internal waters of New Brunswick.

The exclusive legislative authority of the Parliament of Canada extends to all matters coming within section 91(12) of the *British North America Act*, 1867, 30 & 31 Victoria, c. 3, - "sea coast and inland fisheries". While it has been held that this head of legislative authority does not confer upon the federal government any rights of property, it does confer upon it the exclusive right to impose restrictions or limitations by which public rights of fishing are controlled: see *Attorney-General for the Dominion v. Attorneys-General for the Provinces*, [1898] A.C. 700. This exclusive right of regulation, in my opinion, extends to include regulations which have as their object and purpose the protection and preservation of the fisheries such as are contemplated by section 32(2) of the *Fisheries Act*. In this connection, Chief Justice Ritchie observed, as long ago as 1882, in *The Queen v. Robertson*, 6 S.C.R. 52 at page 120 that:

legislation in regard to 'Inland and Sea Fisheries' contemplated by the British North America Act was not reference to 'property and civil rights' - that is to say not as to the ownership of the beds of the rivers or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a material and general concern and important to the public, such as forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth.

There is present here admitted competence in the Parliament of Canada to regulate, protect and preserve the fisheries which, in my view, carries with it as a rational and functional connection, the right to prohibit the deposit of deleterious substances in waters frequented by fish and to provide a punishment for offenders, all as part of an integrated federal scheme to protect the fisheries. In my opinion, section 32(2) of the *Fisheries Act* is *intra vires* the Parliament of Canada; see *Papp v. Papp* (1970), 8 D.L.R. (3d) 389.

Counsel for F.P.L. also submit the rather ingenious argument that as section 33(2) of the *Fisheries Act* prohibits the deposit of deleterious substances in "water frequented by fish" which, by section 33(11) is defined to include all waters in "the fishing zones of Canada" which latter term is not defined in the *Fisheries Act* but by section 4(1) of the *Territorial Seas and Fishing Zones Act* is said to comprise "such

areas of the sea adjacent to the coast of Canada as may be prescribed by the Governor in Council pursuant to section 5.1(1)", then, so this argument goes, the summonses herein, which refer to waters which are not areas of the sea, do not disclose an offence known to law.

This argument, in my view, is fallacious. Section 33(11) of the *Fisheries Act* which defines "water frequented by fish" as *including* all waters in the fishing zones of Canada merely broadens and extends the normal, usual meaning of the words in question. Moreover, section 4(1) of the *Territorial Seas and Fishing Zones Act* merely permits a further extension of that meaning to include areas of the sea adjacent to the coast of Canada as may be prescribed by the Governor in Council, such as, by way of example, the extended 200 mile territorial sea of Canada. Therefore, in my opinion, there is no merit in this submission.

ABUSE OF PROCESS

It was a submission of the applicant that the laying of 30 separate informations and the issuing of 30 summonses against it was oppressive and an abuse of the process of the Court which the Court has an inherent discretionary power to prevent. This discretionary power is said to exist in England: see *Connelly v. Director of Public Prosecutions*, [1964] 2 All E.R. 401 (H.L.). But since the commencement of these present applications, the Supreme Court of Canada has decided otherwise: see *Rourke v. The Queen* (1977), 16 N.R. 181 wherein Mr. Justice Pigeon said at page 185:

I cannot admit of any general discretionary power in Courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive.

CONCLUSION

In the result, for the reasons given, the three applications by Forest Protection Limited herein are dismissed with costs to the informant-respondent.

Note: The appeal is reported at page 229.

REGINA v. IMPERIAL OIL ENTERPRISES LIMITED

Nova Scotia Magistrate's Court, Kimball, J., Halifax, March 6, 1978

Environmental Law -- Water Pollution -- Oil Spill -- Oil deleterious only if present a certain concentration or greater -- Crown failed to demonstrate concentration in water affected -- Oil not proved to be deleterious -- Accused entitled to acquittal -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2), s. 33(11).

A malfunction in the accused's refinery resulted in the release of approximately one hundred gallons of oil into Halifax Harbour, and the company was charged with depositing or permitting the deposit of a deleterious substance in a place where it may enter water frequented by fish. Expert evidence led by the Crown indicated that the oil was lethal only if present in water at a concentration of 50 ppm or greater.

Held, the accused should be acquitted. There being no evidence of the concentration of oil in water, the Crown had failed to prove that the substance deposited was lethal and hence deleterious to fish within the statutory definition. Moreover, there was no evidence to show that any concentration of oil in combination with water was deleterious or toxic. Therefore, the accused was entitled to be acquitted.

Alphacell v. Woodward, [1972] 1 Q.B. 127, *refd to*.

Mr. Richard, for the Crown.

Mr. Gould, for the Accused.

Kimball, J.:—(Excerpts of the Judgment) ...The defendant company, Imperial Oil Enterprises Limited, is charged that it did on or about the 29th day of May, 1977, at or near Darmouth, in the County of Halifax, Province of Nova Scotia, unlawfully deposit or permit the deposit of a deleterious substance, to wit: oil, in a place under conditions where such oil may enter the waters of Halifax Harbour, being waters frequented by fish, contrary to Section 33(2) of the *Fisheries Act*, Revised Statutes of Canada 1970, Chapter F-14 as amended, and did thereby commit an offence under Section 33(5) of the said *Act*. The relevant provisions of the *Fisheries Act* as amended on June the 26th, 1970, repealed and substituted in 1969-1970, Chapter 63, Section 3, in my view are as follows:

33(2) *Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance (or any other deleterious substance) that results from the deposit of such deleterious substance may enter any such water.*

...

(11) *For the purposes of this section and sections 33.1 and 33.2, "deleterious substance" means:*

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered deleterious to fish or to the use by man of fish that frequent the water;"

...Having regard to the information, the Crown therefore must prove, in my view, that the defendant company:

1. Deposited or permitted the deposit of oil in a place under conditions where such oil may enter the waters of Halifax Harbour.
2. That the oil was a deleterious substance.
3. The the waters of Halifax Harbour are waters frequented by fish.

On the evidence, is there then proof that, No. 1, the Halifax Harbour is a water frequented by fish?... Mr. Duerden, the informant and the Crown witness, testified that at some time prior to the date of the alleged offence he had fished for mackerel and cod in his boat in the waters of Halifax Harbour. He also testified that during the time of an oil spill from the Irving Oil Refinery at some time prior to the date of the alleged offence he had occasion to walk along the Darmouth side of the said Harbour at a point north of the defendant's refinery and at that time had walked ankle deep in dead starfish, crabs, worms and mussels. He also testified that at some time prior to the date of the alleged offence he had fished at the Northwest Arm, within Bedford Basin and in the vicinity of McNab's Island and had caught cod at those places, McNab's Island being some two hundred yards' distance from the defendant's refinery. He also testified that he caught mackerel both at the Arm and outside the Arm, but conceded in cross-examination that he didn't fish from a point on McNab's Island closest to the defendant's refinery. Dr. Peter Wells, a Crown witness also, testified that he had seen cod on occasion within the waters of Halifax Harbour. I'm satisfied that from that evidence the waters of Halifax Harbour, including that portion of the water from which exhibits three, four and five - or more correctly, I should say from which exhibits four, five and six, I believe were taken, is and was at the material time a "water frequented by fish".

No. 2, has the Crown proven that the oil was deposited or permitted to be deposited in a place under conditions where such oil may enter the waters of Halifax Harbour? Black's Law Dictionary, revised 4th edition, p. 526, defines "deposit" as: "to place, to put, to let fall as sediment". I am satisfied that the substance visually observed within and without the oil boom and along the shore nearby and described in evidence as oil, and subsequently analyzed as an oil product was deposited in a place called the water sewer system under conditions where such oil might enter the waters of Halifax Harbour. The cause of the oil deposit in the water sewer system was a leak in cooler E-210 and the conditions under which the oil might, and in fact, did enter the waters of Halifax Harbour was the impossibility of its escape elsewhere except by means of the separator which could not and did not prevent its escape. The water sewer system, the separator and cooler E-210 were at all material times owned and entirely within the control of the defendant company. In my view the words of Lord Parker, C.J. in *Alphacell Ltd. v. Woodward*, 1972 1 Q.B. 127 at p. 138, are apt on this point.

It seems to me that the proper approach in any case of this sort is to deal with it as a matter of causation. One begins by visualizing the effluent pouring out into the river, and one asks oneself what or who caused that. When you then find a works, as in this case, conducted in such a way that the effluent is bound to go into and pollute the river unless some equipment is installed to prevent it, and the type of equipment, the maintenance of that equipment, the amount of that equipment, is entirely within the control of the owner of the works then, as it seems to me, it is impossible to say that their actions were not a cause, and as it seems to me, those actions remain a cause unless and until it is shown that some other activity completely outside their control, the action of a trespasser, and Act of God, has intervened and is itself so powerful a cause that what heretofore had been a cause, merely becomes a part of the history or the surrounding circumstances.

No. 3, has the Crown proved that the oil was a deleterious substance?

...

The relevant evidence on this point is that of Dr. Peter Wells, whose qualifications with respect to the toxic effect of gas and oil in water frequented by fish were accepted by the Court. He indicated in his evidence that he was familiar with the term "deleterious" as used in the *Fisheries Act*, but stated that the type of oil and the degree of concentration were two important factors that had to be considered in determining whether it was deleterious. He testified that if forty to fifty gallons of oil were fairly confined within a relatively small area, such as the boom area, then such a quantity in several tens of thousands parts of water could cause toxic effects to fish entrapped in that body of water. He further testified that fifty parts of freshly emitted crude oil on one million parts of water would be acutely toxic and could cause fatality to a number of fish specimens within a three to four day period and to invertebrates within a short period of time. He could not, however, express the same opinion with respect to twenty-nine parts of oil in one million parts of water. He indicated he was not familiar with all species of fish within Halifax Harbour, but that he had seen small cod on occasion, which he, himself, caught off the Bedford Institute Pier on the Darmouth side of the Harbour, but he couldn't express any opinion whether fifty parts of oil to one million parts of water would be toxic to small cod such as he had caught.

...It is perhaps a rather unfortunate definition of deleterious substance in the *Fisheries Act* contains the word "deleterious". Deleterious is defined in the shorter Oxford English Dictionary, 3rd Edition, as "physically or morally harmful or injurious", "noxious"; and in Black's Law Dictionary, revised 4th edition, as "hurtful, morally or physically injurious; poisonous, unwholesome". There is no evidence before the Court that would make relevant the phrase "or to the use by man of fish that frequent the water", contained in the statutory definition "deleterious substance". The evidence differs with respect to the quantity of the oil found within the Halifax Harbour waters on the day in question.

...I am not of the view that in order to obtain a conviction on the charge laid the Crown must prove that the entire waters of Halifax Harbour were rendered deleterious to fish, but I do agree with Mr. Gould's submission that there is no evidence before the Court to show that oil and water *per se* is deleterious to fish. According to Dr. Wells, the toxic effect of oil in water depends upon its concentration and if the concentration

were fifty parts of oil to one million parts of water, it would be acutely toxic to fish and therefore deleterious to fish. From the evidence, I am uncertain as to the quantity of oil, either along the shoreline outside the boom or washed up against the rocks, so much so that I cannot say that the concentration of oil and water in that area was fifty parts or more of oil to one million parts of water. I am satisfied though, that at a material time there was at least fifty gallons of oil within the boom area and fifty gallons outside, extending away from the shoreline. Now, having made that finding as fact, gentlemen, then it remains to be determined whether, given that quantity of oil, a total of one hundred gallons, at least in my view, within the boom area and outside the boom area extending in an area that I would call "towards McNab's Island", was such on the evidence as could be proof that the concentration was, in fact, deleterious to fish.

...There must be proof of the concentration of that oil with the water there. Now, that is my difficulty here. How am I going to determine what the concentration is? All I know is that there was a quantity of water - or quantity of oil rather, lying on top of water, the area of which I am not quite sure, but it was a relatively small area, was in the boom and perhaps a little larger area outside, but I do not know that proportion that bore to the water, be it surrounding it, beneath it, where am I to draw a line?

...I don't think I can ignore the depth of the water because then it would appear to me that if the oil, insofar as it relates to its concentration, could be matched up against the water it was resting on then you would always have I suppose, a molecule of oil resting upon a molecule of water and there would be then a one on one situation and I think it would be rather asinine to suggest that that always made the concentration more than fifty-five per million, but if I don't consider it in that view, then what do I do, go straight down? Assuming that I did, then I would have to have something before me to indicate the depth of the water within the boom area or indeed outside. If I had that, then I could have a hypothetical wall, you might say, that would be comparable, I suppose, to a large container of water, but if that is the situation, I don't know the depth of the water there so that I can say that the oil resting on top, which is fifty gallons in one area, is there below, one million gallons of water? Because as I view the doctor's evidence, there must be to make a toxic, a quantity less than one million in proportion to the fifty parts of oil. Now, I will readily concede that the exhibits introduced in Court contained more by visual inspection, more than fifty parts of oil to one million parts of water. That I have no difficulty in at all, but if that is the simple test and a simple test only, then it would seem to me to follow that any time that there was a little dab, shall we say, of oil lying upon any body of water, however large, that if one scooped that up in a bottle, you would always have fifty parts of oil in one million parts of water and if so factor, that would be deleterious to fish and that would mean to say that any - a little spill, however small, would always, if that were that were the tests, be toxic and therefore deleterious. Now, I can't quite bring myself to that view without some evidence. If I had had somebody testify, which I had not, that even if you had an area of a one foot spread that was covered by oil, no matter whether it was ten feet from shore or out in the middle of the Atlantic Ocean or in the middle of the Halifax Harbour, that would make that water immediately beneath it deleterious, I would be happy with it, but here I only have a proportion, The good doctor was not prepared to say that oil in combination with water was deleterious or toxic.

...and the only evidence as I view Dr. Well's evidence is that there must be, in order to be toxic, therefore in order to be deleterious, a concentration of fifty parts of oil to one million parts of water.

...There is no evidence here of any fish that were killed or injured in any way which is not, I would agree, necessarily essential to the proof of the Crown's case, but that doesn't help me, so I am driven back to the consideration of Dr. Well's evidence to determine whether there was here proof beyond a reasonable doubt that the quantity in that oil on top of the water, it being one hundred gallons, was because of that quantity being there, deleterious to fish and that is what I can't be certain of on the evidence.

...I cannot conclude, and do not, that there is here proof beyond a reasonable doubt, that the oil deposited, however large the quantity, it totalling at least one hundred gallons, at one time was a deleterious substance within the meaning of the *Fisheries Act*. For that reason, and the reason alone, it would of course, follow that an acquittal on the charge was laid would have to be entered...

REGINA v. GULF OF GEORGIA TOWING CO. LTD.

British Columbia County Court, Millward, C.C.J., May 12, 1978

Environmental law -- Water pollution -- Oil Spill -- Deposit of deleterious substance in a place where it may enter water frequented by fish -- Improper manipulation of valves during fuel transfer -- Failure by accused to exercise reasonable precautions -- Appeal allowed and conviction entered -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2).

The Crown appealed the acquittal of the accused on a charge of depositing a deleterious substance in a place under a condition where it may enter water frequented by fish. The charge arose from a spill of oil which was the result of a valve being incorrectly left open during the transfer of fuel from a barge to an on-shore tank.

Held, the appeal should be followed and a verdict of guilty entered. The failure of the accused to exercise a close and continual scrutiny of the valves in question or otherwise to ensure that the correct valves would be open or closed amounted to a failure to ensure that all reasonable precautions were taken. Nor was it a defence to say that the fault lay with the accused's employee who failed to exercise reasonable care notwithstanding the imposition by company directors of rigid safety precautions and training programs.

Canada Tungsten Mining Corporation Ltd. v. The Queen, [1976] W.W.D. 104 (N.W.T.S.C., March 5, 1976); *R. v. The "M.V. Allunga"*, [1977] 3 W.W.R. 673; *Regina v. The Corporation of the City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 253; *refd to*.

D.R. Kier, for the Crown (Appellant)

P.D. Lowry, for the Accused (Respondent)

Millward, C.C.J.:-- The Respondent, Gulf of Georgia Towing Co. Ltd., was charged that it did on or about the 3rd day of November, A.D. 1976, at or near Tsowwin Narrows, County of Nanaimo, in the Province of British Columbia, deposit a deleterious substance, a petroleum product in a place under a condition where such deleterious substance may enter water frequented by fish to wit: Tahsis Inlet. The Respondent was acquitted and the Crown appeals from that acquittal.

The evidence was that the Respondent operated a tanker barge in connection with the supply of certain petroleum products to a storage facility at Sandpoint in Tahsis Inlet, just above Tsowwin Narrows. The storage facility consisted of four tanks with the tanks at the extreme ends being at lower elevations than those in between. On the day in question, one Mr. Egget, was located on the Respondent's tanker barge operating a pumping apparatus, while a crewman was located at the site of the storage tanks, assisting the pumping engineer and watching the storage tanks as they were being filled. The crewman, one Fulmer, testified that on instructions from the pumping engineer one of the two "inside" tanks was filled and the connecting valve turned off. Then, one of the lower "outside" tanks' connecting valve was opened while that tank was pumped full, the pump stopped and the valve turned off. Then, the other "inside" tank valve was opened and the tank filled whereupon the pump was shut off and the connecting valve to the third tank closed. After that the valve to the fourth, "outside"

tank was opened and the workers began to fill that tank with stove oil, whereupon Mr. Fulmer's attention was drawn by another workman to the fact that oil was "spurting out the air valve at the top" of the other outside tank, falling to the ground, and running into the Inlet.

It was agreed that the oil that entered the Inlet was a deleterious substance, and that the Inlet was a water frequented by fish.

Mr. Fulmer testified positively that following the filling of the first three tanks each of the valves associated with those tanks was turned off by him or in his presence by the other worker, but that after the overflow was noted the connecting valve to the outside tank in question was found by Mr. Fulmer to be in the fully open position. He testified that only some ten or fifteen minutes elapsed between his observing the turning off of the valve and the occurrence of the overflow. He said that during that interval there were various workmen walking in the area, preparing to go work, and that he, Fulmer, was in a position to observe the area of the valve and to notice anyone approaching the area throughout the interval, except for a period of four or five minutes when he absented himself briefly before resuming his part in the filling operation. The learned trial Judge found that the petroleum product found its way from the tank in question into the Inlet as a result of the connecting valve in question having been in the open position during the pumping operation intended to result in the filling of the last tank. The trial Judge found it to be a logical inference that the valve in question was opened by some unknown third party during the brief period of time that Mr. Fulmer absented himself from the storage site. The learned trial Judge also expressed the opinion that the Respondent Company "carried out a bad operation" with respect to the delivery of the petroleum products in question.

It is clear on the evidence, and the findings of fact made by the learned trial Judge, that either (a) Mr. Fulmer was in error when he said that the valve in question had been closed by him or his associate or (b) if he was correct in testifying that the valve in question had been closed, then the valve was subsequently reopened by Fulmer or his associate or a third party.

In *Canada Tungsten Mining Corporation Limited v. Her Majesty The Queen*, Morrow, J. in the Supreme Court of the Northwest Territories in a decision dated on the 5th of March, 1976, held that the Appellant did unlawfully permit the deposit of a deleterious substance at a place where it did enter water frequented by fish, where the Appellant failed to exercise due diligence to prevent the occurrence of an oil leak from its plant. The leak was from a defective fuel pipe in the Appellant's plant. In *Regina v. The "M.V. Allunga"* [1977] 3 W.W.R. 673, Seaton, J.A. of the British Columbia Court of Appeal ruled that Section 5 of the *Oil Pollution Prevention Regulations*, namely,

5. *Subject to Section 6(a) no person shall discharge from any ship, and (b) no ship shall discharge oil or an oily mixture into any of the waters...*

imposed a heavy burden, but that the offence in question was one of absolute liability and that it was not open to the (Appellant) to say that it would not have happened but for the fault of some third person. He said at p. 676:

It has been said that a heavy burden is being placed on the ship but I do not find it offensive to demand that ships not spill oil -- how oil spills are to be avoided is a problem for the ship.

In *Her Majesty The Queen v. The Corporation of the City of Sault Ste. Marie*, a decision of the Supreme Court of Canada pronounced on the 1st of May, 1978, Mr. Justice Dickson said at p. 28 of the decision that there are compelling grounds for the recognition of three categories of offences, rather than the traditional two:

1. *Offences in which mens rea consisting of some positive state of mind such as intent, knowledge, or recklessness must be proved by the prosecution either as an inference from the nature of the act committed or by additional evidence, and*
2. *Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case (R. v. Hickey (1976), 29 C.C.C. (2d) 23).*
3. *Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.*

On the basis of *The Canada Tungsten Mining Corporation Limited* case the best position that can be taken from the Respondent's point of view is that this case falls within the second category, that is to say, that of strict liability, and accordingly proof of the prohibited act *prima facie* imports the offence, but the accused may avoid liability by proving that he took reasonable care. To paraphrase Dickson, J. at p. 31, in the present case, the prohibited act would, in my opinion, be committed by those who undertake the delivery of oil and filling of the storage tanks in question, who are in a position to exercise continued control of this activity and prevent the pollution from occurring, but fail to do so. Here the Respondent had complete control of the entire operation and had a clear duty to take all reasonable precautions to prevent any spill from occurring. In view of the obviously immediate and disastrous consequences of carrying on a pumping operation of the kind in question with respect to any one of the four tanks when a connecting valve leading to one of the three other tanks which had already been filled, "reasonable precautions" must be held to include a close and continual scrutiny of the valves in question throughout the entire pumping procedure or, failing such scrutiny, some other method of ensuring that the valves in question would be closed and remain closed throughout. It is clear that no such continual scrutiny, nor any adequate alternative precautions were taken. The Respondent has not discharged the onus upon it. It is not a defence on the part of the Respondent to say that the fault lies with the employee who failed to exercise reasonable care notwithstanding the imposition by the company directors of rigid safety regulations and training programs. The appeal is allowed accordingly, and a verdict of guilty will be entered.

Note: The appeal is reported at page 252.

REGINA v. CHEW EXCAVATING LTD. AND THE CORPORATION OF THE DISTRICT OF SAANICH

British Columbia Provincial Court, Ostler, J., Victoria, B.C., May 16, 1978

Environmental Law -- Water Pollution -- Depositing or permitting the deposit of a deleterious substance in water frequented by fish or in a place under conditions where such deleterious substance may enter water -- Silt a deleterious substance -- Corporation responsible for acts of its agent and company for acts of its employee -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2), Interpretation Act, R.S.C. 1970, c. I-23, s. 14(2)(b).

The co-accused were charged in an information containing four counts with offences against s. 33(2) of the Fisheries Act. While under contract with the Corporation, the limited company undertook the removal of domestic debris from a creek, and in so doing caused extensive siltation of the creek and a river into which it flowed.

Held, the Corporation was found guilty on the charge that it "did unlawfully permit the deposit of a deleterious substance in a place under conditions where such deleterious substance may enter water frequented by fish", and the company was found guilty on the charge that "did unlawfully deposit a deleterious substance in place under conditions where such deleterious substance may enter water frequented by fish." Whether the dictionary meaning of "deposit" was used, or the definition added to the Act after the date of the offence was applied, there had been a "deposit" here within the meaning of s. 33(2). The Crown discharged its burden to show that the silt was deleterious through expert testimony, and did not have to prove actual harmful consequences on fish resistant in the river at the material time. Other evidence proved that the water was "frequented by fish". The Corporation was responsible for the acts of its agents and the company for those of its employee.

Kienapple v. The Queen (1975), 15 C.C.C. (2d) 524, *appl'd*; *R. v. Stearns-Roger Engineering Company Ltd.*, [1973] 2 W.W.R. 669, [1974] 3 W.W.R. 285; *R. v. Jordan River Mines Ltd.*, [1974] 4 W.W.R. 337; *R. v. The Corporation of the City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353; *ref'd to*.

H.J. Wruck, for the Crown

M. Macaulay, for the Accused, Corporation of the District of Saanich.

Ostler, J.: (Orally)--The Corporation of the District of Saanich and Chew Excavating Ltd. are jointly charged in an information of:

Count 1: At or near the District of Saanich, in the Province of British Columbia on or about the 27th day of April, 1977 did unlawfully deposit a deleterious substance in water frequented by fish, contrary to Section 33 (2) of the Fisheries Act, R.S.C. 1970, C. F-14 and C. 17 (1st Supplement).

Count 2: At or near the District of Saanich, in the Province of British Columbia on or about the 27th day of April, 1977 did unlawfully permit the deposit of a deleterious substance in water frequented by fish, contrary to the same Section.

Count 3: At or near the District of Saanich, in the Province of British Columbia on or about the 27th day of April, 1977 did unlawfully deposit a deleterious substance in a place under conditions where such deleterious substance may enter water frequented by fish, contrary to the same section.

Count 4: At or near the District of Saanich, in the Province of British Columbia on or about the 27th day of April, 1977 did unlawfully permit the deposit of a deleterious substance in a place under conditions where such deleterious substance may enter water frequented by fish, contrary to the same section.

In this case the Crown asks that the Corporation be found guilty of counts 2 and 4, and that the limited company be found guilty of counts 1 and 3. But Mr. Wruck concedes that pursuant to the decision of the Supreme Court of Canada in *Kienapple* there should be a conviction with respect to each defendant on one count only.

Put as briefly as possible, the facts of this case are: that at the material time, one Dr. Langford, a consulting biologist, observed equipment working on Swan Creek above the confluence of that creek with the Colquitz River. The equipment was being operated by an employee of the defendant limited company. It is clear from the evidence that the company, Chew Excavating Ltd., had entered into a contract with the Corporation for the supplying of this equipment and its operator to do certain work under the direction of the Corporation. The company was, therefore, not an independent contractor, but in my view an agent on behalf of the Corporation for the purpose of the work being done under the direction of the employees of the Corporation; and specifically the work that was taking place at that time on Swan Creek.

It appears that the Municipality desired to clear out the creek which was full of debris, weeds, garbage, old tires, bicycles - and the witness even mentioned an old mattress. It apparently had been used as a dumping ground and the municipality, commendably in my view, was trying to clear it out and for that purpose had entered into a contract for the use of the equipment and operator from Chew Excavation.

Mr. Langford, who is an expert on the physiology of fish, with impressive credentials, made an investigation when he observed what was happening, and he traced the course of the creek and observed an excessive amount of sediment, as he said, coming out of Swan Creek into Colquitz Creek.

The cat was operating in the stream, and as a result of its activity he said the stream was heavily silted; upstream of the Colquitz River, that is to say, above its confluence with Swan Creek, the stream was clear. And downstream from the confluence the silt was mixing with the water of the Colquitz, and there was evidence of heavy siltation mixing with the clear water of the Colquitz Creek below its confluence with Swan Creek.

The first point for consideration is whether or not in the circumstances this silt was "deposited" in this water, and I have had the advantage of very careful argument from the learned defence counsel and the learned prosecutor.

As counsel have pointed out, that expression, "deposited" was considered by Munroe, J. of the Supreme Court of British Columbia in the case of *Regina v. Stearns-Roger Engineering Company Limited*, [1973] 2 W. W. R. 669, and at page 671, the learned judge of the Supreme Court dealt with the expression "deposit" and he concluded in the circumstances of that case, which are very similar to the circumstances in this case, that actually the bulldozer, the machine that was being used, did deposit the material or the substance in the water.

The judgment of Munroe, J., the determination that he made in that case, was reviewed by the Court of Appeal in [1974] 3 W. W. R. 285. But the Court of Appeal in that case declined to express a view as to the meaning of the word "deposit". The word "deposit" as it appear in the section was also considered in the case of *Regina v. Jordan River Mines Limited*, [1974] 4 W. W. R. 337, where that portion of the judgment of Munroe, J., was adopted and followed.

Mr. Macaulay gave a most impressive argument with respect to that point. He argues that what was done in this case could not properly be considered "depositing" and the learned defence counsel suggests that Section 14 Sub-section 2(b) of the Interpretation Act should be applied to cause the Court to consider the definition of "deposit" which has been added to the Fisheries Act since the activities which led to the laying of this charge. And in the Statutes of Canada, 1976/77 amendments to the *Fisheries Act*, "deposit" is defined and means "any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, flowing, dumping or placing".

Assuming, without deciding, that Mr. Macaulay is correct that I should have regard to the definition of "deposit" since enacted by Parliament with respect to this particular expression, it is my respectful view that in any event the evidence of what was done here brings that activity within the definition of "deposit" since enacted by Parliament but not in effect at the material time. And I think it brings it within the definition by referring to two words which the draftsman has employed, and it appears to me he tried not to overlook anything. But one refers to the words "releasing and placing".

With respect to the "releasing" it seems to me that the activity of this equipment caused the releasing of material which in normal circumstances could be presumed to remain on the river bottom. But, in addition, if one looks at the evidence of Dr. Langford, one sees that he says that the equipment was excavating the bank as well as the bed itself. So, in any event, what the equipment was doing was releasing the material in a real sense. It was also taking or dislodging material from the bank according to the uncontradicted evidence of Dr. Langford, and in my view was releasing it into the stream and was therefore depositing it whether one takes the definition since passed or whether one looks to the dictionary definitions referred to in the cases to which I have already referred.

So, I find that the Crown has shown beyond a reasonable doubt that the material was at this time "deposited" in the water.

The next question is whether or not this was a 'deleterious substance'. Although the statute defines 'deleterious substance' by section 33, sub-section 11, deleterious substance" means (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so

that it is rendered deleterious to fish or to the use by man of fish that frequent water, or (b) any water that contains substance in such quantity or concentration, or that has been so treated, processed or changed, by heat, or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered deleterious to fish or to the use by man of fish that frequent that water," Parliament has refrained from defining 'deleterious' and simply repeats the word "deleterious" when defining a deleterious substance. So, what then is 'deleterious'.

A definition has been given by Munroe J., in the *Stearns-Roger* case.

The Oxford dictionary refers to 'deleterious' as "noxious", that is to say, "harmful, unwholesome, physically injurious".

In this case the Crown must prove that the substance in question was 'deleterious'. In that respect the Crown has called Mr. Langer who was an undoubted expert in fishery biology, and it is clear to my mind from his evidence that the silt that was released by the bulldozer on this occasion was 'deleterious' to fish.

The question here, in my respectful view, is not what happened, that is to say, whether any fish were killed - and clearly there were not, or, at least, they weren't seen to be but whether when it went into the water the silt was a deleterious substance.

It must be said that the activity was stopped on the intervention of an outside party. But, the material, as I understood the evidence, was a deleterious substance because it could do harm to fish in these circumstances. And on the evidence of Mr. Langer it is clear that it was harmful to fish in the Colquitz Creek.

I, with all respect to contrary opinion, have no difficulty in finding, on the evidence, that this substance, the silt, placed, released, into the water as it was in the circumstances of this case was deleterious and harmful to fish.

The word is not "inimical" or "fatal", it is "deleterious" simply, as defined, that it is harmful and unwholesome for fish and I find that it was.

The next question is whether this was water frequented by fish. Once again, one must go to dictionaries, and Blacks Law Dictionary refers to 'frequent' as "to visit often; to resort to often or habitually." And Oxford, "to go often or habitually to."

Having regard to the natural habits of fish and what has been said in this case, it is clear that this is water frequented by fish, perhaps not as much as desirable, and perhaps not as much as one hopes it will be in the future if the present plans materialize, but never-the-less, this water is frequented by fish.

There remains for consideration the responsibility with respect to each of the defendants. In so far as the District of Saanich is concerned, the employee of Chew Excavating was there under contract with this employer. He was there under the direction of the Corporation and its servants and it is clear from the evidence that complied with the directions of the servants of the Corporation; and applying what was said by the Supreme Court of Canada in the case of the *The Queen v. the Corporation*

of *Sault Ste. Marie*, with respect to the Corporation, I find that the Corporation did unlawfully permit the deposit of a deleterious substance as set out in Count 4, in the act of Mr. Morrissey, who, as the operator of the equipment, acting under the direction of the servants of the Corporation, carried out the work as directed, and in that instance the Municipality permitted the deposit which resulted. And the Municipality is found guilty of Count 4.

With respect to the defendant, Chew Excavating Ltd., irrespective of the fact that the employee was there under contract between Chew Excavating and Saanich, I am of the view nevertheless, in a charge of this kind, that there is a responsibility on Chew Excavating Ltd. to ensure that its employees do not carry out any activity which is unlawful. What was done in this case was contrary to the *Fisheries Act* and was therefore unlawful and the limited company is convicted of Count 3 because of the action of its servant.

Having regard to the *Kienapple* case, there will be no finding with respect to the balance of the counts.

REGINA v CANADIAN FOREST PRODUCTS LTD.***Provincial Court of British Columbia, Johnson, J., June 1, 1978***

The accused was charged under s. 33(2) of the *Fisheries Act*, R.S.C. 1970 c. F-14 and c. 17 (1st Supplement) with spilling about 1000 gallons of Bunker C oil into Howe Sound near Vancouver when an oil pipe ruptured and the oil seeped into the waters through a nearby sewage system. The company took all possible steps to clean-up the oil slick in co-operation with Environment Canada, at a cost of \$51,000.00 to the company.

Held: The accused was found guilty. Bunker C oil was a substance deleterious to fish and the waters adjacent to the sewerage outfall, from which the oil discharged from the pump mill, are frequented by fish. The *Fisheries Act* was one of absolute liability and s. 33(2) was an enactment of environmental protective legislation. The Crown was not required to prove that the substance was deposited in such a manner that the concentration at the time of the deposit was, or could be deleterious to fish, but only that it was known to be a substance which was deleterious to fish. Further, the defence of due diligence under s 33(8) was not available, as on the facts there was not an exercise of all due diligence to prevent the environmental damage, which includes due diligence being used in the construction, maintenance and inspection of the installation.

This decision has not been appealed.

Headnote from (1978), 7 C.E.L.R. 113

C. Osborn, for the Crown
L.M. Candido, for the Accused

Johnson, J:--The accused is charged with two counts under Section 33(2) of the *Fisheries Act* of Canada.

Section 33(2):

No person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

The charges are:

Canadian Forest Products:

COUNT 1: at or near Port Mellon, in the County of Vancouver, Province of British Columbia, on or about the 14th day of September, A.D. 1977, did unlawfully permit the deposit of a deleterious substance, to wit: oil, in water frequented by fish, contrary to s. 33(2) of the *Fisheries Act*, R.S.C. 1970 C.F-14 and C.17 (1st Supplement).

COUNT 2: at or near Port Mellon, in the County of Vancouver, Province of British Columbia, on or about the 14th day of September, A.D. 1977, did

unlawfully deposit a deleterious substance, to wit: oil, in water frequented by fish, contrary to s. 33(2) of the *Fisheries Act*, R.S.C. 1970 C.F-14 and C.17 (1st Supplement).

The facts are that on 14 September 1977, during the pulp mill start-up of the Port Mellon Mill of Canadian Forest Products Ltd., an oil pipe ruptured and the oil leaked into the mill sewerage system and then into Thornborough Channel in Howe Sound, which is about five miles north of Gibsons, in the County of Vancouver, Province of British Columbia.

About 9:00 p.m. in the evening, oil was being pumped from the storage tanks to the boilers and there was a split in the oil pipe, caused by wear from vibration, which allowed the oil to leak for about one-half hour. The oil pipe was several feet off the ground outside, adjacent to a building and the escaping oil collected on the ground to a depth of approximately two inches. Some of the oil leaked into an open sewer about ten feet from the oil leak. It so happened at that time, that hot water was being drained away from another part of the mill through this sewerage system which was connected to the sewer opening adjacent to the oil leak. This sewer line lead to the alkaline outfall and the oil was subsequently discharged into the water of Thornborough Channel.

From all the evidence, the best calculation of the amount of oil that did leak from the pulp mill into the salt water was about one thousand gallons. The oil was a heating fuel known as Bunker C. There was no evidence of the exact chemical composition of this Bunker C, but from all the evidence, I concluded that it was used in the normal way as boiler heating fuel and was similar to other Bunker C oil.

When the mill crew discovered the leak, the oil line was shut down and the crew immediately took all steps to prevent further discharge of the oil into the sewer outlet. The oil leaked out into the salt water and was not discovered by the mill officials until approximately 8:00 a.m. the next morning, when a large oil slick was noticed stretching from the pulp mill about two and one-half miles down Howe Sound. As soon as the oil slick was discovered, the company officials, in cooperation with Environment Canada officials took all possible steps to clean up the oil spill, and this cost the company \$51,000.00.

There is no doubt that the waters of Thornborough Channel and Howe Sound are waters frequented by fish. From the evidence I have heard, I find that the waters adjacent to the sewerage outfall, from which the oil discharged from the pulp mill, are abundant in fish and marine life.

I had thought that from these facts there would be no dispute that the Bunker C fuel oil was a substance deleterious to fish, and I do in fact find that the Bunker C oil which did leak from the Canadian Forest Products Ltd. pulp mill at Port Mellon into Thornborough Channel on Howe Sound, was such a deleterious substance.

In *Canada Tungsten Mining Corporation Limited v. Her Majesty The Queen* (1976), 5 C. E.L.N. 120 (NWTSC), the parties agreed that fuel oil was a deleterious substance, Morrow J. stated at page 4:

Finally it was agreed that Flat River is water frequented by fish and that diesel or fuel oil is a deleterious substance.

Bunker C or bunker oil has been found to be a deleterious substance in other previous cases: *Her Majesty The Queen v. Imperial Oil and B.C. Hydro and Power Authority* in the County Court of Vancouver, 25 November, 1975, His Honour Judge Catliff found that bunker fuel oil known as Fuel 46 was a deleterious substance; on 19 April, 1978, at the Provincial Court at Port Hardy, in *Regina v. Rayonier Canada*, His Honour Judge Watts found that Bunker C oil was a deleterious substance. There have been other cases in which other hydro-carbons have been found to be deleterious substances, particularly two previous judgements by this Court at Powell River, British Columbia: *Regina v. Norman Kirby*, 8 May, 1972; and *Regina v. Standard Oil Co. of British Columbia Ltd.*, 20 January 1975; wherein it was found that gasoline was a deleterious substance.

In *Suzuki and Ionian Leader (B.C. Admiralty District) (1950 Exchequer Court of Canada)*, Sidney Smith D.J.A. stated in *obiter dicta* on page 952:

The plaintiffs rely on Section 33 of the Fisheries Act, 1932 which forbids the dumping of deleterious substances into fishing waters. This does not specifically mention fuel oil but I have no doubt that oil would be covered by the section.

It would appear from this judgement that His Lordship was taking judicial notice that oil was a deleterious substance. Taking into consideration the familiarity of persons with gasoline and oil products in every day life and the national and international concern with oil pollution, it may be that a Court might be able to take the judicial notice that oils, gasoline and other hydro-carbons were deleterious substances, but I need not do that in this case as there is more than sufficient evidence for me to find that the oil deposited by the company was a deleterious substance from the evidence presented.

The trial in this matter lasted two days. The Crown presented two witnesses, who were accepted as expert witnesses, Mr. Guy Hebert, a Marine Biologist, and Dr. Ian Birtwell, and Environmental Scientist, and they both expressed the opinion that Bunker C oil deposited into salt water would be a deleterious substance in water frequented by fish.

The defence called as an expert witness, Dr. Cecil Walden, head of the British Columbia Research Council who gave substantial evidence in regard to conducting bio-assays of small fish in water collected from Thornborough Channel and controlled samples of a similar type Bunker C oil obtained from the company's Port Mellon pulp mill. Counsel for the defence advanced a strenuous argument as to why I should find that the Bunker C oil is not a deleterious substance in this case. I find that the defence argument is based on a misunderstanding of the meaning of the words contained in Section 33(2) of the *Fisheries Act*, and the essential ingredients which the Crown is required to prove in order to obtain a conviction under this section of the Act.

The *Fisheries Act* is one of strict liability, and Section 33(2) of the *Fisheries Act* is an enactment of environmental protective legislation, this is expressed by Judge Morrow in the *Canada Tungsten* case, at page 5:

Crown Counsel argues that this section creates absolute liability, that the absence of mens rea is no defence, and that the appellant here must bring itself under subsection (8) to gain the acquittal. One of the more recent decisions relied on for this proposition is R. v. Jordon River Mines Ltd., [1974] 4 W.W.R. 337. At page 339 Osler, D.J. quoting in part from R. v. Pierce Fisheries Ltd., [1971] S.C.R. 5; 12 C.R.N.S. 272; [1970] 5 C.C.C. 193; 12 D.L.R. (3d) 591 holds:

In my view, the offences charged fall under that 'wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public which are not subject to the presumption that mens rea is an essential ingredient.

I am in entire agreement with the enunciation of the law and with the Crown's submission here. See also the judgment of this Court in Monkman v. The Queen, 1972 3 W.W.R. 686.

The defence submitted in argument that the Crown must prove that the Bunker C oil which was deposited in this case was deleterious to fish, and that even though Bunker C may be deleterious at some concentrations, the Crown has not proven that the concentration of Bunker C oil in this case was harmful to fish. Although the Crown had samples of the oil deposited, no bio-assays on fish were done to calculate the toxic effect, if any, of this particular Bunker C oil on fish. The defence further submits:

It is fundamental that the concentration of the oil in the body of water is an essential ingredient in determining whether or not a substance is deleterious.

The Crown's evidence that the Bunker C oil in this case is a deleterious substance is based on the expert opinion of the two witnesses, Mr. Hebert and Dr. Birtwell. Mr. Hebert said he did bio-assays on four different types of Bunker C and that the LC50 (the concentration of oil in which there would be lethal effect to one-half of the test fish in 96 hours) of the oils tested ranged from 780 to 5600 parts per million. He gave his expert opinion based principally on these tests and on his specialized knowledge that all Bunker C oils would have a toxic, that is lethal effect on fish as defined by the *Fisheries Act*.

Dr. Birtwell corroborated Mr. Hebert's opinion as to the toxic effect of any Bunker C on fish.

Dr. Walden gave evidence that at the request of the defence he arranged for the conduct of certain bio-assays at different levels of concentration of Bunker C oil. When asked if he had obtained an LC50, Dr. Walden said he did not, but could have. In his evidence, Dr. Walden expressed the opinion that in certain concentrations over a certain time Bunker C oil would not be toxic to fish. He did not express the opinion that the Bunker C oil from the Port Mellon pulp mill would not be deleterious at any concentration but only at the concentration at which he performed his tests. I find that Dr. Walden did not disagree with the Crown's expert opinion evidence that the Bunker C oil from the Port Mellon pulp mill would be toxic to fish at some specifically unknown concentration.

Dr. Birtwell described the life cycle of fish and the life chain of fish in the marine environment, and he said that oil, when it comes into contact with marsh grasses destroys the growth of these grasses, which are necessary in the life cycle of the juvenile fish, small shrimp and other marine animals, which, in the life chain support the higher stages of marine life. Dr. Birtwell also described how light is a necessary ingredient in the existence of certain marine life and that an oil slick on the surface of the water may cut off this light and therefore do harm to some of the marine animals requiring that light, such as small shellfish. Dr. Birtwell also described how the small juvenile herring come to the surface at night and that an oil slick in the water with some of the factions in the oil breaking down and dissipating into the water would do harm to the juvenile herring.

When the definition of "fish" is considered, it is evident that the legislation intends to protect not only that which may be fish of commercial value, but all those parts of marine life of the marine habitat.

The definition of "fish" Section 2 of the *Fisheries Act*, as amended is:

shellfish, crustaceans, marine animals and the eggs, spawn, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.

The Crown is not required to prove that the substance deposited was deposited in such a manner that the concentration at the time of the deposit was, or could be deleterious to fish.

In *Regina v. Kirby*, page 6, this Court said:

I heard evidence from two technicians of the Department of Fisheries who have conducted bio-assays as to fish and particularly gasoline. As to the whole of the evidence and hearing their opinion I find that the Crown has proven that gasoline is a deleterious substance as set out in the charge.

There was no evidence that at the time of the offence that there were in fact any fish in the water covered by the gasoline, and there was no evidence that any fish were or might be expected to be degraded at that time at that place by the gasoline deposited in that water. I find that it is not necessary that the Crown prove that there is or might be any degrading of fish, the Crown need only prove that at some time the water is frequented by fish and that gasoline is a deleterious substance and that the accused did permit the deposit thereof.

The judgment was upheld on appeal, *Regina v. Kirby*, unreported, Swencisky, C.C.J. County of Vancouver, 22 November, 1972.

The definition of "deleterious substance" was amended by the *Fisheries Act Amendment* of 1 September, 1977 and there was added to the definition the words "likely to render deleterious" and the words "fish habitat". It is these words which made Section 33(2) of the *Fisheries Act* even more stringent.

The definition of "deleterious substance" is set out in Section 33(11) of the *Fisheries Act*:

"deleterious substance" means

- (a) *Any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use of man of fish that frequent that water.*

An analysis of the definition of "deleterious substance" indicates that almost any substance may be deleterious to water frequented by fish. The substance is deleterious if, when added to water, it should "degrade" or "alter" the water and the word "alter" must have a different meaning from "degrade" to be used in this manner. The key words of the definition or that the substance need not of itself "degrade" or "alter" the water but only that it may "form part of a process of degradation or alteration of the quality of that water".

"Environmental Law" - West Coast Environmental Law Association, 1976, at page 87, states in reference to Section 33(2) of the Fisheries Act:

These provisions are very wide in scope -- the definition of deleterious substance is sufficiently broad and ambiguous that it could include almost any substance added to that water. The provisions therefore are extremely valuable in combatting water pollution.

This statement was made before the present amendments to the *Fisheries Act*.

I find that it is not necessary for the Crown to prove that the substance deposited was of such a concentration or attained such a concentration in the water, in this particular case, that it was deleterious to fish, but only that it is known to be a substance which is deleterious to fish.

All pollution legislation is concerned not only with the immediate damage of a pollutant but also by the cumulative effect of any substance, as expressed by the words "form part of degradation", Section 33(11).

Defence counsel argues that:

If the Crown's theory of absolute responsibility is correct then the owner of every motorboat that has a drop of oil leak out of the motor is guilty of an offence under the Fisheries Act.

This cited situation would be controlled under Section 6 of the Oil Pollution Regulations, *Canada Shipping Act*, but if the fisherman should throw a gallon of oil into the water from the dock, he would commit an offence under Section 33(2), the *Fisheries Act* does not distinguish between one gallon, one thousand gallons or ten thousand gallons, as to liability.

In considering the facts that in this case 1000 gallons of Bunker C oil was deposited into Thornborough Channel, a body of water abundant in fish near the place of the company's outfall, I have no doubt the company deposited a deleterious substance, to wit, oil in water frequented by fish.

The second defence of the accused is that the company exercised all due diligence to prevent the oil spill and that under the provisions of Section 33(8) of the *Fisheries Act* the circumstances of the case are such that the accused should be found not guilty.

Section 33(8) -

In a prosecution for an offence under this section or sections 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

Defence counsel submits:

The evidence indicated that the Defendant had procedures to try to prevent spills and to deal with an oil spill if one happened. What occurred was an accident and there was no evidence it should have been prevented.

I find that at all relative times, the persons at the pulp mill of the accused were the employees of the accused, and that pursuant to Section 33(8) of the *Fisheries Act* that the company was responsible for their actions, although I do find that the company and its employees at all relative times took all reasonable action to prevent a further development of the oil spill. That is not the point to be decided, the question is, did the company use all due diligence to prevent the commission of the offence prior to the accident occurring?

I find the facts to be that the company had maintained an oil pipe line feeding their heating boilers, the pipe line was hanging in the air on the bracket and was subject to wear from vibration and that ultimately there was a rupture in the oil line at this point. I find that such a rupture or damage to the pipe could have been anticipated by the company and the ultimate rupture of the pipe would indicate that there was not due diligence exercised in the maintenance of the pipe to prevent the leakage. Ten feet from the oil pipe line, a sewerage outlet lead directly to the sewerage outfall discharging the sewer wastes out to the water frequented by fish. I find that the company did not use all due diligence to prevent the commission of the offence in allowing the open outlet to be located in an area adjacent to oil pipe lines. Surely, an environmentally conscious engineer would have anticipated the dangers of an oil spill to the salt water, had this type of construction been examined in consideration of the prevention of environmental damage.

The facts of this case are not very much different from the facts of *Canada Tungsten Mining Corporation v. Her Majesty The Queen*. In that case there was a rupture of the oil lines supplying the fuel to the buildings at the company's establishment, the leak from the pipe was due to corrosion of the pipe, and Morrow J. found that the company was guilty of the commission of the offence under Section 33(2) and that the company's defence of due diligence was not accepted. Morrow J. states at page 9:

It is clear that the appellant from the first moment of discovery, and I do not have to review the facts here, acted responsibly and with alacrity. There was no attempt to hide the affair from the authorities. Rather every effort was made to consult with those responsible for the environment and to act upon their advice. In excess of \$39,000.00 was spent by the appellant before the problem was under control.

In my view, however, those efforts, laudable as they may be, go more properly to alleviate penalty, rather than affect liability. They are all after the fact.

I cannot read the wording of Section 33(8) except to require "due care and diligence" to refer to preventing the leak not correcting the leak or reducing the damages. It is quite true, as was argued, that to prevent the leak in the present case, to set up inspections to look for weaknesses in the installations such as are found at the appellant's plant may be difficult. The fact of the matter is that no such tests appear to have ever been made since the plant was erected, and certainly no routine ever laid down for opening the packing around the offending pipes to see if erosion was taking place.

Regina v. Standard Oil interpreted the words "due diligence" this Court said:

The cases recognize, R. v. Industrial Tankers, that commercial enterprises have large and numerous installations which are potentially dangerous to deposit a deleterious substance in water frequented by fish and if this offence does occur then there may be a very substantial damage to the environment and the health and welfare of the community. The legislation places a very heavy onus on persons who should own or operate such installation not to commit the offence. The person must "exercise all due diligence to prevent" the environment damage and in a prosecution under this Act it is for the person charged to prove that "all due diligence" has been exercised, because the words of the section are "unless the accused establishes". The defences in common law the charge of strict or absolute liability are not applicable, the defence to the offence is found in the legislation. In the Fisheries Act, Section 33(8) is the defence to a charge under Section 33(2). In the Oil Pollution Prevention Regulations, Section 6, is the defence to a charge under Section 5, and Section 10-12 are the defences to a charge under Section 9.

The meaning of the words "due diligence" means not only the acts of the person charged, their employee or agent at the time of the offence, but also "due diligence" in the construction, maintenance and inspection of the installation. For the purpose of this case I do not need to go this far, but it may be that the person is required to prove not only that the installation was properly constructed and maintained, but that which was constructed was the best and most advanced construction possible to prevent the environmental damage. It may not be enough to say a cement retaining wall was built to prevent a gasoline spill without additionally proving that a cement wall was the best type of construction to prevent the spill.

I find that the Crown has proven all the essential ingredients of the charge on Count 1, and I find the accused guilty to Count 1. Since Count 2 is a charge under the same section of the same facts, I find the company not guilty on Count 2.

REGINA v. MACMILLAN BLOEDEL (ALBERNI) LIMITED

British Columbia County Court, McClellan Co. Ct.J., Port Alberni, June 12, 1978

Fisheries -- Depositing deleterious substance in water frequented by fish -- Oil spill -- Meaning of "water frequented by fish" and "deleterious substance" -- Crown need not prove that fish frequenting water specifically affected by spill are harmed thereby -- The Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2), (11) [both re-en, 1970 (1st Supp.), c. 17, s. 3 .]

The accused corporation spilled five barrels of bunker oil into water beneath its deep-sea dock located in a river estuary frequented by fish. As a result, it was charged under s. 33(2) of the *Fisheries Act*. The Crown's expert gave evidence concerning the oil's toxicity to fish. However, no specific tests had been made of the effect of the oil spill on the water under the dock. The trial judge acquitted on the ground that the Crown was required, and had failed, to prove that the water under the dock as a result of the spill was thereby rendered deleterious to fish. The Crown appealed.

Held, the appeal was allowed. The words "water frequented by fish" in s. 33(2) require only that the water in question be used regularly by fish, even if only annually for a short period. The word "water" includes water at the site of the spill, but is not limited to it. As the oil would have spread into areas where fish travelled, the Crown had proved that the water under the dock was water frequented by fish within the meaning of s. 33(2). Finally, the trial judge had placed too high a burden on the Crown in proving that the oil was a deleterious substance within the meaning of s. 33(11). That subsection imposed no burden on the Crown to show that the oil added to the specific water under the dock in some specific quantity was harmful to the species of fish that in fact frequented such water. The Crown discharged its burden on showing that the oil was harmful to any species of fish when added to any water.

D.R. Kier, for the Crown.

D.W. Shaw, for the respondent.

Headnote from 7 B.C.L.R. 210

Case also summarized at (1978), 7 C.E.L.R. 128

McClellan Co. Ct.J.:--The Crown (appellant) appeals the acquittal of the respondent by Ward Prov. J. in the Provincial Court of British Columbia, holden at Alberni. The judgment was made on 14th November 1977.

The accused corporation was charged with two counts as follows:

- | | |
|---------|--|
| Count 1 | On or about the 15th day of February A.D. 1977, did unlawfully deposit a deleterious substance oil in water frequented by fish, to wit, Alberni Inlet, Province of British Columbia, contrary to Section 33(2) of the <i>Fisheries Act</i> . |
| Count 2 | On or about the 15th day of February A.D. 1977, did unlawfully permit the deposit of a deleterious substance oil in water frequented by fish, to wit, Alberni Inlet, Province of British Columbia, contrary to Section 33(2) of the <i>Fisheries Act</i> . |

The accused corporation had pleaded not guilty to both charges and was found not guilty of both charges. The Crown appeals the acquittal on count 1 only.

Briefly, the facts reveal that on 15th February 1977 five barrels of Bunker C oil were spilled into the water beneath the accused corporation's deepsea dock at Alberni Inlet, British Columbia. The oil spill occurred because a suction valve on the line used in the unloading operation was not closed before draining the pipeline. The learned Provincial Judge, in his reasons for judgment, summed up the facts as follows:

Five barrels of oil, however, escaped down a drainpipe from the roof or ran down the pilings to enter the water beneath the dock, where it was mostly contained by a boom around the outer pilings of the dock, installed for that purpose.

Prompt action by the corporation reduced the effect of the spill so that its effect was only minimal. There seems to be no issue that the spill occurred and that it occurred in water under the corporation's dock. Therefore there were two issues involved in the trial. Both of these arose from an interpretation of two expressions used in s. 33(2) [re-en. 1970 (1st Supp.), c. 17, s. 3] of the *Fisheries Act*, R.S.C. 1970, c. F-14. The Act reads as follows:

(2) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

The learned trial judge devoted some time to considering the expression "water frequented by fish" and came to the conclusion with respect to the word "frequented" that Parliament had intended that to mean that "there has to be an element of habitual association of fish with that water". I would concur with that interpretation of the word "frequented". But I do not conclude that the meaning can be extended to mean that the water must be occupied by fish continually or even very frequently. If it is apparent that fish use the water in question regularly -- even if only annually for a short period -- then such water would, in my opinion, qualify as "water frequented by fish".

In dealing with the word "water", the learned trial judge placed many limitations upon it and apparently concluded that Parliament had intended by the use of the words "water frequented by fish" to mean areas frequented by fish. I can find no authority to support such a conclusion. I believe the court must take judicial notice that fish move around and, further, that waters move around.

The pier in question was located in an area adjacent to the mouth of the Somass River, and this is graphically depicted in Exs. 6A and 6B. It is notorious the damage which occurs to shorelines from oil tanker spills, and this damage can occur only by the movement of the water distributing the oil along the shorelines for considerable distances. There was evidence before the learned trial judge of the fish fry feeding along the shoreline of the Somass River and additional evidence as to the fish being in the area around the mouth of the Somass River. The area in question is situated almost immediately to one side of the mouth of the Somass River, and any fish

proceeding to that river or proceeding from it must pass within a very short distance of the dock in question. That any substance entering the water around the dock could and would spread over the area in which such fish travel cannot be gainsaid. The Crown had therefore proved beyond a reasonable doubt that the waters under the accused corporation's dock are waters frequented by fish within the meaning of s. 33(2).

I am supported in this view by the judgment of Catliff Co. Ct. J. in the unreported decision, *R. v. Imperial Oil Ltd.*, which was decided on 20th November 1975. In commenting on that definition, he said:

The point, as I understand it, is that the words 'that water' in s. 33(11) [en. 1970 (1st Supp.), c. 17, s. 3] have reference only to water alleged to be degraded at the actual site of the spill. I do not consider the words 'that water' earlier in the subsection. The words 'any water' would include the water at the site of a spill but are clearly not limited to it.

The learned trial judge found that the water of the estuary of the Somass River in the Alberni Inlet in which the deepsea dock is located is water frequented by fish. With the ebb and flow of the tides in the area, and the effect of the water from the estuary, there is no doubt that the oil from the dock would affect waters passing by it in either direction and thus affect waters frequented by fish.

It remains to consider the meaning of the words "deleterious substance". Section 33(11) of the *Fisheries Act* reads, in part, as follows:

deleterious substance' means (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered deleterious to fish or to the use by man or fish that frequent that water, or ...

The word "deleterious" is defined in the Shorter Oxford English Dictionary as "physically or morally harmful or injurious". For the purposes of this case a deleterious substance would mean a substance that, if added to any water, would degrade or alter or form part of a process of degrading or alteration of the quality of that water so that it is rendered physically harmful or injurious to fish.

The Crown relies mainly on the evidence of Dr. Ian Kenneth Birtwell, a biologist with the Department of Fisheries, Fisheries and Marine Service, of the federal government. This witness, whose qualifications were admitted, gave evidence that in his opinion Bunker C oil was deleterious to fish, although he admitted that it could, in certain circumstances, be sub-lethal and affect the fish adversely without necessarily killing the fish. He agreed that there are many variables in deciding the toxicity of Bunker C oil, including the temperature of the oil, the temperature of the water in which it is placed, the activity of the water in which it is placed, and certain others.

Dr. Birtwell was cross-examined extensively as to the fact that no specific tests of the waters of Alberni Inlet had been completed to show the actual effect of the Bunker C oil on the water under the dock. It was pointed out that the authorities which he quoted, and which recorded tests as to the effect of Bunker C oil elsewhere,

all dealt with waters of a different kind and in a different area and under different conditions.

The definition provides that, to be deleterious, the substance need only be a substance that "if added to *any water* would degrade or alter or form part of a process of degradation or alteration of the quality of the water so that it is rendered deleterious to fish" (the italics are mine).

In my opinion the learned judge erred in imposing too heavy a burden on the Crown in requiring it to prove beyond a reasonable doubt that the water under the dock, having had the Bunker C oil added to it, was thereby rendered deleterious to fish. As I understand the effect of s. 33(2) of the *Fisheries Act*, it makes it an offence to deposit into water frequented by fish a substance which would, when added to water located in any part of the world and under any circumstances, render it deleterious to fish. I admit that this is a very wide interpretation, but the words "to any water" do not permit of any restriction in that regard. As I understand the definition, it simply means that once a substance has been found to be deleterious to fish when added to water anywhere, it then becomes an offence to deposit it into water in any other location.

It is paradoxical that a very strict interpretation of the words "to any water" lessens rather than increases the burden upon the Crown to prove the charge. It is not incumbent upon the Crown to prove that the specific substance added to the specific water of the dock area in Alberni Inlet in some specific quantity has harmful effects on fish. The effect of the Act is to provide that if such a substance has had a harmful effect on fish elsewhere when added to water, then it qualifies as a deleterious substance under the *Fisheries Act*. The cross-examination of Dr. Birtwell is enlightening, and I quote:

Q. All right, I'll put it another way. If you have one drop of Bunker C oil and you drop it in the middle of the ocean, are you going to come to court and say that that is deleterious to fish? A. In that Bunker C is deleterious to fish, I would say that it is deleterious to fish, whether it's a drop or two million gallons.

Q. Is that the same for gasoline? A. Yes.

Q. So anybody who uses a motorboat and drops a drop of gasoline while going down the Alberni Inlet, you suggest that's deleterious to fish and therefore there's been a breach of the law there? A. Yes, I do.

Q. You go that far? A. You're asking my opinion whether or not it's deleterious, and to me if it's deleterious it's deleterious whether it's one tablespoon or two hundred gallons.

Q. Well, surely the test is whether fish fry are deleteriously affected. Can you, in all honesty, say to this court that if a drop of oil is dropped in the middle of the ocean that fish are either going to die, or are going to be deleteriously affected? A. If it is a drop then it, presumably, once it's diluted, would not come up to 7,500 parts per million in a test. But it has been well documented that this particular oil is deleterious to fish. Now, the magnitude of the effect is obviously dependent upon various conditions and the amount of oil.

Q. Has it ever been documented that one drop of oil in a reasonably sized container like the containers used by your two people, Hebert and Kussat, is deleterious to fish? A. Of any oil?

Q. Well, of Bunker C, I'll start with. A. Bunker C I don't think so, I don't think that a drop, whatever a drop is, I don't think that a drop of Bunker C in a large container has been tested. However, I do know that less than one cubic centimetre of oil in a litre of water has been shown to be toxic to pink salmon fry.

Of course, in the case of the example cited by Dr. Birtwell, such as the dropping of one drop of Bunker C oil in the ocean or the spilling of gasoline from an outboard engine, should a charge be laid, a court would likely apply the doctrine of *de minimus non curat lex*, but one can understand why even a small amount of a deleterious substance added to water in certain circumstances may render it injurious to fish. For example, if every power boat entering Nanaimo or Vancouver harbour added one-half pint of oil to the water in the harbour, it could very well cause serious contamination of the waters in the harbour and easily be deleterious to fish.

In summary, the onus on the Crown in the first count was to prove the following beyond a reasonable doubt:

- (a) The formal essentials such as place and date.
- (b) That Bunker C oil, in some quantity, was released into water by action of the respondent company. There was no issue on this essential.
- (c) That the water into which it was released was frequented by fish. For the reasons given, I have found that the waters under the respondent company's dock were waters frequented by fish.
- (d) That the substance, Bunker C oil, is deleterious to fish when added to any water. There was positive evidence of this fact from Dr. Birtwell, and that evidence was uncontradicted. I should also say, for clarity, that there appears to be no onus on the Crown to prove that the substance must be deleterious to the species of fish which frequent the waters in question. It is sufficient if the substance is known to be deleterious to other species of fish in other waters.

The intention of Parliament is made clear from a reading of the *Fisheries Act*. That Act was intended to put an onus on persons depositing any substances into waters frequented by fish to satisfy themselves that such substances were not deleterious to fish before they deposit them into such waters.

I would be manifestly ineffective to place an onus on the Crown to prove more than the essentials above listed, and the wording of the Act makes that very clear. It would be unreasonable to expect the Crown to sample each spill in any area whether remote or not, have it analyzed and the analysis produced as evidence. Most spills would be dissipated long before such a process could be put in action. There is no language in the Act that such a procedure is necessary. The use of the words "any water" instead of "water" was not an accident. In my view those words, and others in the Act, were purposely selected to place the onus on the person or corporation where

it belongs -- that is, on the person who deposits a substance in waters frequented by fish.

It is clear from the Crown's evidence that, in the opinion of the expert, Dr. Birtwell, Bunker C oil when added to water is deleterious to fish. The quantity which escaped into the water was approximately 170 gallons, which is certainly sufficient to warrant a charge being laid under the Act. The fact that the company promptly reduced the effect of the spill to a minimum is something which can be taken into account in mitigation but is not a factor in deciding the corporation's guilt or innocence of this charge.

For the reasons aforesaid, I would allow the Crown's appeal and enter a conviction against the corporation on count 1.

REGINA v. MACMILLAN BLOEDEL (ALBERNI) LIMITED

British Columbia Court of Appeal, Bull, Seaton, Carrothers, JJ.A., April 5, 1979

Environmental Law -- Water Pollution -- Oil Spill -- Deposit of deleterious substance in water frequented by fish -- Meaning of "water frequented by fish" -- Meaning of "deleterious substance" -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 2, 33(2), 33(11).

The accused appealed its conviction in the County Court on a charge of depositing a deleterious substance in water frequented by fish. The grounds for the appeal were that the County Court Judge erred in his interpretation of the meaning of "water frequented by fish" and "deleterious substance".

Held, the appeal should be dismissed. It was not incumbent upon the Crown to prove that the few cubic feet of water into which the oil was spilled contained fish at the time of the event, given the fact that both fish and water move. Nor did the statutory definition of "deleterious substance" oblige the Crown to prove that the water into which the substance in question was introduced was rendered deleterious as a result; it was sufficient to show that the substance was itself deleterious when added to any water. The County Court Judge exercised his discretion properly in refusing to re-open the case.

R. v. of Georgia Towing Company Limited, unreported, B.C.C.A. February 7, 1979, *R. v. Sault Ste. Marie* (1978), 85 D.L.R. (3d) 161; 40 C.C.C. (2d) 353; *refd to*.

D.R. Kier, for the Crown, Respondent
D.W. Shaw, for the Accused, Appellant

Seaton, JJ.A.:--The appellant was charged that it did unlawfully deposit a deleterious substance in water frequented by fish, contrary to s. 33 (2) of the *Fisheries Act*. It was acquitted in the Provincial Court but an appeal was taken to the County Court where the acquittal was set aside and a conviction entered. This appeal from conviction is restricted to a question of law alone.

The appellant says that the County Court judge erred in his interpretation of the phrase "water frequented by fish", in his interpretation of the phrase "deleterious substance", and in denying the appellant's application to reopen the case.

The charge arose out of a spill of about 170 gallons of bunker C oil during unloading at the appellant's deep sea dock at Alberni Inlet. A suction valve was not closed when it ought to have been and the oil spilled beneath the dock. The appellant was prepared for this sort of accident and the response was prompt. Very little oil spread beyond the dock and the cleanup was carried out relatively quickly. If an offence was committed when the oil was spilled, the containment of the oil and the prompt cleanup would be relevant to the sentence but not the conviction.

There have been some changes in the *Fisheries Act*, and what follows may be inapplicable to other cases. The provisions that concern us are these:

33.(2) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

33.(11) For the purposes of this section and section 33.1,

"deleterious substance" means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered deleterious to fish or to the use by man of fish that frequent that water,

2. In this Act ...

"fish" includes shellfish, crustaceans and marine animals;

The first argument arises out of the words "water frequented by fish". The learned trial judge concluded that this oil was not deposited in water frequented by fish for these reasons:

The evidence established that the deep sea dock was in that part of the Alberni Inlet which forms the estuary of the Somass River, that is, the intertidal waters where the fresh water of the River and the salt water of the Inlet intermingle. The lower reaches of the Somass River are spawning grounds for four species of salmon, namely, sockeye, chum, coho, and spring, and the habitat of Steelhead trout. Adult salmon migrate up the river in the summer and fall, even as late as the end of the year in the case of coho salmon. Salmon fry could be found in the waters of Alberni Inlet from the 1st of February until the latter part of the summer depending upon water temperature and other conditions. They would feed in the shallow waters along the shoreline. On the 9th February, 1977, a fisheries office had carried out an inspection of the waters of the Inlet and had found freshly hatched chum salmon fry in the shallow waters of the Inlet including the water of Lupsi Kupsi Point some 200-250 yards from the deep sea dock. Sculpins had been observed off the deep sea dock during tests carried out in 1975-76. On the day of the spill, 15th February, 1977, and during the following four of five days when the clean-up operation was carried out, there was no evidence of fish being under or around the deep sea dock. As the Crown's evidence showed that salmon fry are normally found in the shallow waters of shorelines, no reasonable inference could therefore be drawn that salmon fry were present in the water beneath the deep sea dock on the 15th February, 1977, or during the subsequent clean-up. Mr. Kier submitted that it was irrelevant that no dead fish were observed as a result of the spill. However, it seems to me that if salmon fry had been present under the dock during this incident their dead carcasses would have been very much observed. The absence of carcasses means either there were no fish under the dock or if there were the oil was not deleterious.

On this evidence and applying the interpretation of "water frequented by fish" above, I find (a) that the water of the estuary of the Somass River in the Alberni Inlet in which the deep sea dock is located is water frequented by fish; (b) that the particular water beneath the deep sea dock was not frequented by fish; (c) that the oil spill was contained in the water beneath the deep sea dock and did not endanger the fish frequenting other parts of Alberni Inlet. The Crown has therefore failed to prove that the oil was deposited in "water frequented by fish" as alleged in both counts.

I think that approach too narrow. It restricts the enquiry to commercial fish present at the moment of the spill in the very drop of water into which the oil was spilled. I am not prepared to accept any of those restrictions. The definition of "fish" is given in the Act and it is broad. The section does not speak of "water in which there are fish" but of "water frequented by fish". To restrict the word "water" to the few cubic feet into which the oil was poured would be to disregard the fact that both water and fish move.

I think that the learned County Court judge did not err in law when he concluded that this deposit took place into water frequented by fish.

I turn now to that is meant by "deleterious substance". It is the appellant's submission that to prove this charge the Crown must show that after the spill the water was made deleterious. That was what the learned Provincial Court judge said:

The definition of "deleterious substance" is not very satisfactory because it begs the question when it states a "deleterious substance means (a) any substance that if added to water ... it is rendered deleterious to fish..." According to Dr. Birtwell one drop of bunker sea oil in the middle of the ocean can be potentially deleterious to fish. This may well be so but what the Crown has to establish in view of the words in the definition "so that it is rendered deleterious to fish" (emphasis added).

Deleterious means "physically or morally harmful or injurious" (Oxford International Dictionary, p. 474). In my view, then, the degradation of the water must be shown to be harmful or injurious to fish.

Dr. Birtwell's evidence showed that there were many factors to be taken into account in determining whether bunker sea oil rendered water deleterious to fish, but there was little, if any, evidence of these factors with respect to the water under the dock into which the oil was spilled. Two samples of this water (Exhibits 4 and 5) were collected by the fisheries officers but there was no evidence of any test upon them for toxicity. Dr. Birtwell's opinion on the toxicity of bunker sea oil in water was stated in broad terms based on tests carried out by others. As most of the conditions affecting that toxicity were not proven with respect to the water under the dock, I cannot find that that water was in fact rendered deleterious.

The learned County Court judge rejected that approach and I think he was right in so doing. Section 33 (2) prohibits the deposit of a deleterious substance, not the deposit of a substance that causes the water to become deleterious. The argument to the contrary is based on the definition of "deleterious substance". I must agree with

the Provincial Court judge that a definition section that uses the word being defined is awkward.

What is being defined is the substance that is added to the water, rather than the water after the addition of the substance. To re-phrase the definition section in terms of this case, oil is a deleterious substance if, when added to any water, it would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that water is rendered deleterious to fish or to the use by man of fish that frequent that water. Applying that test to the findings of fact here, bunker C oil is a deleterious substance. Once it is determined that bunker C oil is a deleterious substance and that it has been deposited, the offence is complete without ascertaining whether the water itself was thereby rendered deleterious. I do not think that the words "that water" in the definition section mean the water into which it is alleged the accused deposited the substance. Those words refer back to "any water", at the beginning of the definition; the hypothetical water which would degrade if the oil was added to it.

The appellant says that the purpose of this legislation is to prevent waters being rendered deleterious to fish and that if given the plain meaning of the words, an absurdity will result. It is said that if a teaspoon of oil was put in the Pacific Ocean and oil was a deleterious substance, that would constitute an offence. In its submission that absurdity can be avoided by reading the Act to require that the water be made deleterious. There are some attractions to that reasoning, but I think that the result would be at least as unsatisfactory. Nothing could be done to prevent damage to the water that fell short of rendering the water deleterious. To prove that the damage had gone that far would be difficult indeed.

Had it been the intention of Parliament to prohibit the deposit of a substance in water so as to render that water deleterious to fish, that would have been easy to express. A different prohibition was decided upon. It is more strict. It seeks to exclude each part of the process of degradation. The thrust of the section is to prohibit certain things, called deleterious substances, being put in the water. That is the plain meaning of the words used and is the meaning that I feel bound to apply.

The appellant applied to re-open before the County Court judge in order to argue the implications of *Regina v. Sault Ste. Marie* 85 D.L.R. (3d) 161; 40 C.C.C. (2d) 353; 3 C.R. (3d) 30 which had just been handed down. It is not apparent whether the application to re-open was made after or before the pronouncement of judgment.

For reasons that I expressed in *Regina v. Gulf of Georgia Towing Company Limited*, February 7th, 1979, I doubt that the *Sault Ste. Marie* decision would be useful to the appellant, but that is not before us. The County Court judge exercised his discretion in refusing to re-open. I do not think that he erred in law in so doing. That is the end of the appropriate enquiry in this court.

I would dismiss the appeal.

BYRON CREEK COLLIERIES LIMITED v. THE QUEEN

*British Columbia County Court, Provenzano Co. Ct. J., Cranbrook, B.C.
September 13, 1978*

Environmental Law -- Water Pollution -- Permitting the deposit of a deleterious substance in a place from where it entered water frequented by fish -- Accused constructing works to divert stream around overburden dump site -- Unforeseeably large rainfall causing erosion and pollution despite accused's efforts -- Defence of Act of God available -- Accused entitled to acquittal -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2).

Environmental Law -- Water Pollution -- Permitting the deposit of deleterious substance in a place from where it entered water frequented by fish -- Accused spending large sum on construction of works to prevent pollution and erosion -- Accused intending to complete works but prevented from doing so by delay in governmental approval -- Government inspector testifying that interim efforts of accused were adequate -- Defence of all reasonable care available -- Accused entitled to acquittal -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2).

The accused corporation appealed from a conviction on one count of unlawfully permitting the deposit of silt in a place from which it entered water frequented by fish, contrary to s. 33(2) of the *Fisheries Act*. The accused had dumped overburden into a ravine, although a stream that intermittently flowed through the dump site had been partially diverted around it at considerable expense. Additional works were planned to control erosion and pollution, but a delay by the government in approving them meant they were not in place when the area was subject to an unusually heavy rainfall. This caused extensive erosion of material out of the dump site and into a nearby creek.

Held, the appeal was allowed. On the foreseeability of the unusual rainfall the trial judge erred in his finding of fact and thereby failed to give proper effect to the defence of Act of God. While the appeal could have been allowed on that ground alone, the County Court Judge also found that the accused had brought itself within the defence of all reasonable care. This was evidenced by the accused's expenditure of \$400,000 on the pollution control measures, by the testimony of a provincial Inspector of Mines that the accused's interim efforts were adequate, and by the fact that the delay in implementing the full scheme for pollution control was the fault of the government, not the company. Short of suspending operations entirely, the accused did everything reasonable within its power to prevent the commission of the offence, and therefore could escape liability on this ground as well.

R. v. Jack Cewe Ltd. (1975), 23 C.C.C. (2d) 237; *R. v. The Corporation of the City of Sault Ste. Marie*, [1978] 3 C.R. (2d), (1978) 40 C.C.C. (2d) 253; *appl'd*.

S. Campbell, for the Crown, Respondent
L.A. Best, for the Accused, Appelant.

Provenzano, Co. Ct. J.:(Orally):--This appeal was heard by me on the 13th of June, 1978, and I adjourned it over to today to give me ample opportunity to review the transcript which were extensive in this particular appeal and to consider the

authorities that were cited to me on argument. I apologize that by reading my Reasons for Judgment it may take a little longer than if I'd had them typed and presented to the Court.

The appellant was convicted on the 14th of December, 1977, at Fernie, by His Honour Judge L.A.T. Nimsick of an offence under Section 33 (2) of the *Fisheries Act*, R.S.C. 1970, Chap. F-14. The offence charged was that the appellant between the 1st day of December, 1974, and the 16th day of August, 1976, near Corbin in the County of Kootenay, Province of British Columbia, unlawfully did permit the deposit of a deleterious substance in a place where such deleterious substance may enter water, to wit, Michel Creek, which is frequented by fish. The appellant appeals that conviction to this Court upon the several grounds set out in the Notice of Appeal.

The appellant is a federally incorporated company carrying on a strip coal mining operation in the southeast corner of this Province at Coal Mountain near Corbin. The appellant commenced these operations in late 1972, although the site had been the object of previous mining operations dating back to the turn of the century. The appellant held valid permits to operate the strip mine issued by the Reclamation Branch of the Department of Mines and Petroleum Resources of the Province of British Columbia. The permits authorized the appellant to develop pits and dump areas as designated in the plans submitted on its behalf by Golder Brawner Associates, a consulting geotechnical engineering firm.

In the course of carrying out its strip mining operations, the overburden covering the coal seams was removed and dumped into a ravine, through which at certain times of the year Open Cut Creek ran. This creek eventually flowed into Michel Creek. Where this dump interfered with the natural flow of Open Cut Creek, the appellant installed a plastic pipe to carry the creek water over and down the dump site. The appellant also constructed a settling pond and culvert system to catch the waters of Open Cut Creek to prevent these waters from interfering with the dump site.

The appellant had, from the commencement of its operations, proposed to the government departments plans for sedimentation and control structures to protect the local streams from runoff containing spoilage. These proposals were delayed and stalled mainly due to conflicts between the government departments and not due to any fault on the part of the appellant. The delays consumed the better part of one year and final approval to the plans was eventually granted in August 1976. In the meantime, while the appellant did take some steps to install controls and had expended some \$400,000.00 in doing so. However, it was not able to complete the essential settling ponds as a lease of Crown lands was necessary for this purpose. This was not forthcoming until the final approval was received.

During the first two weeks of August 1976, heavy rainfalls occurred in the southeast corner of the Province in the area of the appellant's operations. Roads were washed out and the appellant ceased operations in order to save the roads. The excessive rainfall caused a scouring erosion of the mountain side, including part of the dump site, and a mud flow resulted ending up in Michel Creek. This occurred about the 10th of August, 1976.

On the 16th of August, 1976, John Williams, a Conservation Officer for the Fish & Wildlife Branch for the Province of British Columbia, attended at the confluence of

the Open Cut Creek and Michel Creek and took a number of samples of water and stream bed from these creeks. These samples were analyzed by David Brown, the laboratory scientist for the Province of British Columbia. Brown found on the basis of these samples that the residue and turbidity levels in Michel Creek were higher below the confluence of Open Cut Creek than above. Otto Langer, a Pollution Biologist who viewed Michel Creek and Open Cut Creek on the 23rd of February, 1977, concluded that Michel Creek was a normal, productive, salmonid stream. He observed siltation in Michel Creek and concluded that a large sediment release from Open Cut Creek had caused it. It was his opinion that this siltation would clog the stream bed thus affecting the support system of the fish and that the suspended solids would impair the fish's ability to breathe. (Langer concluded that this situation was deleterious to fish. This opinion was not shared by Gary Vigers, an environmentalist consultant). Vigers conducted a bioassay test on rainbow trout and cut-throat trout to ascertain if suspended solids were harmful to fish. In tests containing concentrations of suspended solids the same or greater than found in Michel Creek at the relevant times, he found no harmful effects on these fish.

In October, 1976, Williams laid an information against the appellant charging a violation of Section 33 (2) of the *Fisheries Act*.

The trial occupied several days. Namely, the 24th and 25th of February, 1977, and the 4th and 5th of May, 1977. This was followed by written submissions from counsel and judgment was given by the learned trial judge on the 14th of December, 1977.

While the appellant has listed several grounds of appeal, I believe that they can be grouped for these purposes into three categories without harming or diluting the force of the grounds of appeal.

The first category is the general ground that the conviction cannot be supported on the evidence.

The second is more particular in that it is that the trial judge did not properly weigh the evidence in support of the defence of an act of God.

And lastly, that the trial judge did not consider the evidence in support of the defence that the appellant, in the circumstances, (acted with due diligence or with all reasonable care).

For the purposes of this appeal, it is only necessary, in my respectful opinion, to deal with the last two categories. Evidence was adduced at the trial relating to the rainfall in the area neighbouring the site of the appellant's operations at Coal Mountain. The evidence, in my respectful opinion, clearly shows that the rainfall was unusually high for that time of the year and also was an unusual occurrence. Upon my reading of the transcript of the evidence, I cannot find any evidence which contradicts that evidence. There was not testimony adduced to indicate that the amount of rainfall that occurred could reasonably be expected to occur. For example, Mr. Nohels testified that he had not seen it rain like that in 50 years.

However, the learned trial judge rejected that evidence. He said at page 6 of his Reasons for Judgment:

The rainfall that caused the mud flows during August was foreseeable and the results were inevitable.

An appeal court must not lightly interfere with the findings of fact that are made by the trial judges. Often findings of fact that are made by trial judges are influenced by the credibility of witnesses which the trial judge must assess. That aspect is not, in my respectful opinion, present here. Therefore, where that is the case, then it may be proper for an appeal court to weigh the evidence and make a finding of fact in the same manner as the trial judge. With all respect to the learned trial judge in this case, I cannot say that I would, on the evidence come to the same conclusion as he did on this point. The evidence of the unusualness of the amount and occurrence of the rainfall is uncontradicted. The inference is to be drawn this situation also existed at the site of the appellant's operations.

At page 3 of his Reasons for Judgment, the trial judge said:

During the summer of 1976 an exceptional amount of rain fell in the area with result that a large amount of rock, coal, and other materials were carried down the draw in which Open Cut Creek runs into Michel Creek.

It appears to me that the trial judge had concluded that the rainfall was unexpected or unusual and on the evidence I would say that that is the inevitable conclusion that must be made.

That being the case then, I cannot agree with the trial judge in the absence of any evidence to the contrary that this unusual rainfall should have been foreseeable. There is, with all respect, no evidence to support that finding. In my respectful opinion, the rainfall that occurred in August 1976 at the site in question was not foreseeable and I would so find on the evidence.

Therefore, in my respectful opinion, the trial judge was wrong in not giving effect to the defence advanced that the harmful flooding of Michel Creek was caused by an act of God, namely, the heavy rainfall. There was uncontradicted evidence to support this from witnesses who testified that it was this rainfall that caused the flooding.

On this ground this appeal is similar to the case of *Regina v. Jack Cewe Ltd* (1975), 23 C.C.C. 2nd, 237. In the case my brother Judge Grimmer, C.C.J., gave effect to a defence of an act of God where he found the amount of rainfall to be an act of God and could not be reasonably expected. So in the circumstances of this appeal I would find that the rainfall was clearly unforeseeable and unexpected and that the appellant had a good defence to the charge. On that ground alone I would allow the appeal.

However, I am also satisfied that the appeal must be allowed on the third category that I mentioned above.

This case was decided in December of 1977. At that time the case of *The Queen v. The Corporation of the City of Sault Ste. Marie* was pending before the Supreme Court of Canada and has been reported now in [1978] 3 C.R. (3d) 30. Judgment in that case was handed down on the 7th of May, 1978. While the unreported Reasons for

Judgment in that case were available to this Court at the hearing of this appeal, they were not, of course, available to the trial court nor was the case submitted to that Court for consideration at that time.

The decision in the *Sault Ste. Marie* case is, to say the least, a landmark decision in the law relating to cases commonly called pollution cases.

Had that case been available to the trial court and to counsel before the trial at the trial, no doubt the evidence adduced would have been more extensively canvassed with respect to the law enunciated in that case. No doubt, also, the learned trial judge would have directed his mind to the law in that case when weighing the evidence adduced.

In the *Sault Ste. Marie* case, the City of Sault Ste. Marie was charged -- and I must say at this point that all my citations from the *Sault Ste. Marie* case are from the Unreported Decisions at page 2:

The City of Sault Ste. Marie was charged that it did discharge, or cause to be discharged, or permitted to be discharged, or deposited materials into Cannon Creek and Root River, or on the shore or bank thereof, or in such place along the side that might impair the quality of the water in Cannon Creek and Root River, between March 13, 1972, and September 11, 1972. The charge was laid under s. 32(1) of the Ontario Water Resources Act, R.S.O. 1970, c. 332, which provides, so far as relevant, that every municipality or person that discharges, or deposits, or causes, or permits the discharge or deposit of any material of any kind into any water course, or on any shore or bank thereof, or in any place that may impair the quality of water, is guilty of an offence and, on summary conviction, is liable on first conviction to a fine of not more than \$5,000 and on each subsequent conviction to a fine of not more than \$10,000, or to imprisonment for a term of not more than one year, or to both fine and imprisonment.

The facts of the case are not, I suggest, important here. However, the nature of the offence before the Court in that case is similar in intent to the offence on this appeal, notwithstanding that in the former it was a provincial statute involved, whereas here we were concerned with a federal statute.

Mr. Justice Dickson gave the judgment of the court and his opening remarks are interesting and I cite them here. Page 1:

In the present appeal the Court is concerned with offences variously referred to as "statutory", "public welfare," "regulatory," "absolute liability," or "strict responsibility," which are not criminal in any real sense, but are prohibited in the public interest. (Sherras v. De Rutzen, [1895] 1 Q.B. 918.) Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like. In this appeal we are concerned with pollution.

Those words, I believe, set the tenor for the learned dissertation that he propounds later in his judgment. With the greatest respect, if I may simplify, the learned justice goes on to say that on the one hand there are true criminal offences and on the other hand there are absolute liability offences, but somewhere between lie the public welfare offences.

In this regard he commences the development of his reasoning this way, at page 9:

The distinction between the true criminal offence and the public welfare offence is one of prime importance. Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.

In sharp contrast, "absolute liability" entails conviction on proof merely that the defendant committed the prohibited act constituting the actus reus of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a malefactor and punished as such.

Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent.

After reviewing many authorities and reported decisions, Mr. Justice Dickson concludes as follows at page 26:

We have the situation therefore in which many Courts of this country, at all levels, dealing with public welfare offences favour (i) not requiring the Crown to prove mens rea, (ii) rejecting the notion that liability inexorably follows upon mere proof of the actus reus, excluding any possible defence. The Courts are following the lead set in Australia many years ago and tentatively broached by several English courts in recent years.

It may be suggested that the introduction of a defence based on due diligence and the shifting of the burden of proof might better be implemented by legislative act. In answer, it should be recalled that the concept of absolute liability and the creation of a jural category of public welfare offences are both the product of the judiciary and not of the Legislature. The development to date of this defence, in the numerous decisions I have referred to, of courts in this country as well as in Australia and New Zealand, has also been the work of judges. The present case offers the opportunity of consolidating and clarifying the doctrine.

The correct approach, in my opinion, is to relieve the Crown of the burden of proving *mens rea*, having regard to Pierce Fisheries and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.

In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

I conclude for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

- (1) Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
- (2) Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case.
- (3) Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

In that case, Mr. Justice Dickson then went on to find that the change in that case was a pollution offence which he considered to be a public welfare offence with no presumptions of a full *mens rea*. On this the learned justice went on to say at page 30:

The conflict in the above authorities, however, shows that in themselves the words "cause" and "permit" fit much better into an offence of strict liability than either full *mens rea* or absolute liability. Since s. 32 (1) creates a public

welfare offence, without clear indication that liability is absolute, and without any words such as "knowingly" or "wilfully" expressly to import mens rea, application of the criteria which I have outlined above undoubtedly places the offence in the category of strict liability.

Proof of the prohibited act prima facie imports the offence, but the accused may avoid liability by proving that he took reasonable care.

I have no difficulty whatsoever in concluding that the offence before this Court on this appeal is for the same reasons given by Dickson, J. similarly an offence of strict liability.

Therefore it would be open to the appellant to exculpate itself from liability by showing on a balance of probabilities that it had used all reasonable care in the circumstances.

There was some evidence before the learned trial judge in this case of the care or due diligence taken by the appellant in the circumstances. And there is some indication that the learned trial judge may have weighed that evidence. And while it is to be presumed that a trial judge is alive to the law, unless the contrary can be shown, it cannot be said, in my respectful opinion, that the learned trial judge was properly charged on the law in this case as stated in the Sault Ste. Marie case.

In my respectful opinion, the learned trial judge considered responsibility on the basis of absolute liability -- which is the third category of offences set out by Mr. Justice Dickson and in that case it is concluded that the act of dumping having been done by the appellant and the polluting of Michel Creek having originated from the dump, the appellant was liable and no defence was open to it.

However, in my opinion, for the reasons given by Mr. Justice Dickson, as I have mentioned above, this offence falls into the second category of offences mentioned by him.

Ordinarily in such circumstances the proper course to follow would be for this Court to order a new trial. However, in view of my finding on the second ground of appeal above and because in my view there is some evidence already before the Court upon which this Court may make a finding of fact relative to this ground of appeal, I deem it proper and just not to order a new trial.

I would find on the evidence that the appellant had taken all reasonable care that in the circumstances could have been taken. The appellant has installed various overflow pipes over the dump, constructed ditches and some ponds. It had expended some \$400,000.00 on this work to prevent the polluting of local streams. For over a year prior to the polluting event, it had sought approval from government departments of its plans for complete pollution control. The evidence indicates that approval of these plans was held up by the very department that commenced these proceedings. Henderson, the Inspector of Mines, testified that the efforts of the appellant were adequate. His department was also satisfied with the program laid down to be undertaken by the appellant. Another inspector of mines, Mr. Lewis, also testified that he was of the opinion that the appellant's proposals was the ideal solution to the problem of any pollution. Short of ceasing operations, he stated that he had doubts

that the appellant could have taken other measures to prevent the polluting that took place.

Mr. Aiello testified as to the steps taken by the appellant to install ditches and settling ponds. Particularly he related the delays and difficulties with government departments on their plans.

The appellant had all necessary approvals to carry on their business and had for sometime been carrying on their business. But it didn't have approval for the pollution control system proposed. This was not forthcoming until August 1976, after the big rains and the pollution occurred.

Up to that time there was no evidence of any polluting of Michel Creek.

As Mr. Lewis said, short of shutting down operations entirely, what else could the appellant have done?

In my respectful opinion, the appellant took all reasonable care in the circumstances and in these circumstances two things must be noted, namely, that the delays created by the government and that there were unusual rains both of which could not have been reasonably anticipated or foreseen by the appellant.

For these reasons I would allow the appeal on this ground also. The appeal is allowed and the conviction is quashed. There will be an order that the fine be returned to the appellant.

RAYONIER CANADA LIMITED v. THE QUEEN

British Columbia County Court, Millward Co. Ct. J., Nanaimo, B.C., October 13, 1978

Evidence -- Admissions -- Corporation alleged to have deposited deleterious substance in water frequented by fish -- Crown introduced admissions made by accused's employees -- Existence of agency relationship only asserted by third parties -- Evidence inadmissible as hearsay -- Failure to prove agency relationship -- Admissions not admissible as against corporate accused.

Environmental Law -- Water Pollution -- Deposit of deleterious substance in water frequented by fish -- Oil Spill -- Crown identifying substance in water only as "hydrocarbon" -- Crown's expert testifying that not all hydrocarbons are deleterious -- Failure by Crown to prove deposit -- Accused entitled to acquittal -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2).

The Corporation appealed from a conviction on a charge of depositing oil in water frequented by fish, contrary to s. 33(2) of the *Fisheries Act*. Fishery Officers sampled an oil slick in water adjacent to the accused's premises, but the analysis introduced showed only that "hydrocarbon" was present in the samples. They also recorded admissions inculpatory to the accused made by two of its employees. At the time of the alleged offence, soil in the accused's property in an excavation surrounding part of its fuel system was saturated with "Bunker C."

Held, the appeal should be allowed. The admissions made by the employees should not have been received in evidence, because the Crown's only proof of an agency relationship was inadmissible hearsay given by the Fishery Officers. In the absence of the admissions, the Crown had failed to discharge the onus to show that the oil was deposited by the company, and that the oil in the water was the same substance as that found on the accused's premises. Moreover, the Crown's expert witness testified that not all hydrocarbons are deleterious substances.

Confederation Life Association of Canada v. O'Donnell (1886), 13 S.C.R. 218; *Jarvis v. London Street Railway Co.* (1919), 48 D.L.R. 61; *R. v. Strand Electric Ltd.*, [1969] 1 O.R. 190; ref'd to.

E.C. Chiasson, for the Accused, Appellant.

E.M. Reid, for the Crown, Respondent.

Millward, J.:—The Appellant operates a pulp mill at Port Alice, British Columbia, and was convicted on the following count:

On or about the 21st day of July, A.D. 1977 at Port Alice, British Columbia, did unlawfully deposit a deleterious substance, to wit oil, in water frequented by fish, to wit the Neroutsos Inlet, Province of British Columbia.

Fisheries Officers testified seeing "what appeared to be an oil slick" on the waters of Neroutsos Inlet, near the Appellant's plant, and caused samples of the substance to be taken. The Officers told of seeing certain excavation work involving

two pipelines some five hundred feet inland from the dock area, where a substance which appeared to be the same product as that in the water near the dock was seen to saturate the soil. They saw the two pipes in the excavation and observed that the soil surrounding the area was saturated with a black fluid. They assumed the fluid was a petroleum product and described it as a heavy black viscous liquid. On the waters of the inlet itself they saw what appeared to be globules of bunker oil. The samples taken by the Fisheries Officers were analyzed and found to contain "hydrocarbon".

Expert evidence was given to the effect that hydrocarbons can be harmful to fish; that the effects of "Bunker C" on fish vary from toxic to relatively innocuous; and that not all hydrocarbons are deleterious or harmful to fish.

The Crown relied on certain admissions made by two employees of the Appellant to the Fisheries Officers, who testified that the employees represented themselves to be the technical Superintendant of the mill complex and the Environmental Liaison man, respectively. The learned trial Judge referred to admissions made by the Appellant's employees to the Fisheries Officers in concluding that the substance in question was Bunker C oil and that it had escaped into the waters in question as a result of a leak from the Appellant's oil line.

The Appellant says that the evidence concerning the admissions made by the Appellant's employees is inadmissible. Cross on Evidence (3rd) at p. 441 says that statements made by an agent within the scope of his authority to third persons during the continuance of the agency, may be received as admissions against his principal in litigation to which the latter is a party, but that so far as the reception of admission is concerned the scope of authority is a strictly limited conception. The admission must have been made by the agent as part of a conversation or other communication which he was authorized to have with a third party. Further, the existence of the agency must be proved before the agent's admissions can be received against the principal. The alleged agent's own statement of this fact would be inadmissible hearsay. Here, the only proof of the agency of the two employees consists of representations made by the employees themselves to the Crown's representatives.

In *Confederation Life Association of Canada v. O'Donnell* (1886), 13 S.C.R. 218, Gwynne, J. held at p. 230:

The declarations or acknowledgements of an agent are never admitted as evidence against his principal unless they are part of the res gestae and they become admissible, not as admissions, but solely on the ground that they are part of a transaction then being conducted by the agent for his principal.

Again, in *Jarvis v. London Street Railway Co.* (1919), 48 D.L.R. p. 61, at 64, Middleton, J. said:

Upon the argument and objection of the ruling of the trial Judge excluding evidence as to statements made by the conductor immediately after the accident was dealt with ---. It was said that immediately after the plaintiff had fallen the conductor alighted and helped him to his feet and that then a conversation took place where the conductor said: "It was my fault. I should not have opened the door, but I thought the car had

stopped." The conductor was clearly not a person whose statement would bind the Company; he was not the agent of the Company for the purpose of making any admissions. His statement if it be admissible in evidence at all should only be received upon the ground that it formed part of the res gestae.

In *R. v. Strand Electric Ltd.*, 1969 1 O.R. 190, Laskin, J.A. (as he then was) in a dissenting judgment recognized two principles for the admissibility of an agent's admissions against his employer. There must exist proof of the agency and the admission of the agent to a third party must have been made within the scope of his authority during the subsistence of the agency. A third party cannot testify that the agent himself asserted the existence of an agency relationship because that would be hearsay, and accordingly the agency must be established by means other than by out of Court statements of the alleged agent himself.

Accordingly, the evidence of statements made by the Appellant's employees to the Fisheries Officers was not properly admissible, and with respect, should not have been considered by the learned trial judge. The only other evidence as to the nature of the substance in question was given by the Fisheries Officers who said that it was a heavy black viscous liquid and they assumed it to be a petroleum product, and that the sample was analyzed to contain hydrocarbon. The Appellant says that the Respondent (Crown) has failed to establish that the material in question, that is the black viscous liquid containing hydrocarbon, was a deleterious substance. On that issue there was evidence to the effect that while hydrocarbons can be harmful to fish, the hydrocarbon contained in "Bunker C" if indeed the substance in question was Bunker C, can vary in its effect on fish from toxic to relatively innocuous. The Crown's witness testified that not all hydrocarbons are deleterious or harmful to fish. An expert witness called by the Crown was asked:

Q. *Well, is it not fair to say that if you as an expert were simply told that a particular compound or material contained hydrocarbons, told nothing more about it, I take it you would agree with me that you couldn't say one way or another whether that particular substance was harmful to fish.*

A. *No, I could not. Not without being more specific as to which hydrocarbon.*

The Appellant further argues that there was not sufficient evidence to indicate how the substance in question was deposited by the Appellant in the ocean. The learned trial Judge found that in all of the circumstances it was an irresistible inference that the substance in question came from the Appellant's plant. With respect, following the exclusion of the admissions of the Appellant's agents, and in the absence of evidence identifying the substance in question, as the same as that found on the Appellant's premises, while the inference may be a reasonable one, it is not irresistible and the Crown has not discharged the onus on it to show that the substance in question, deleterious or otherwise was deposited by the Appellant.

The Appeal is allowed and the conviction set aside.

REGINA v. CRESTBROOK FOREST INDUSTRIES LTD.

Supreme Court of British Columbia, Toy, J., Cranbrook, B.C., November 20, 1978

Information -- Sufficiency -- Deposit of logging debris in water frequented by fish -- Charges alleging only that offences occurred within a four month period in creek and tributary thereof -- Trial Judge quashing charges after accepting as fact defence counsel's statement that creek was twenty-five miles long and had one hundred different tributaries -- On Appeal, information held to be sufficient and valid -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(3); Criminal Code, ss. 510, 512 and 729.

The accused was charged with depositing or knowingly permitting the deposit of logging debris in water frequented by fish. After plea, but prior to the calling of evidence, defence counsel moved for a dismissal of the charges on the grounds of vagueness or uncertainty of the time and place of the alleged offences. The trial judge accepted as fact defence counsel's statement that the creek to which count one applied was twenty-five miles long, and the tributary to which count two related was potentially one of a hundred different tributaries. Accordingly, the charges were quashed on the grounds that they were defective in form and substance and failed to meet the requirements of s. 510 of the Criminal Code. The Crown appealed by way of stated case.

Held, the appeal should be allowed and the case remitted to the Provincial Court Judge for continuation of the trial. If details as to the place of the offences were lacking and were necessary in order to ensure a fair trial, then it is was open for the accused to ask Crown counsel for further details. As to the vagueness or uncertainty of time, the information could not be quashed on this ground as the Crown was alleging that a certain course of conduct over the four month period constituted the offence.

Brodie v. The King [1936], 65 C.C.C. 289; *Regina v. Toronto Magistrates, ex parte Bassett*, [1967] 1 C.C.C. 251; *R. v. Nadin* (1971), 14 C.R.N.S. 201, *R. v. Kiningor and Voszler* (1972), 18 C.R.N.S. 120; *referred to*.

R.W. Cairns, counsel for the Attorney-General of British Columbia, Appellant.
M.E. Moran, Q.C., counsel for the Respondent.

Toy, J.:--This is an appeal by way of stated case from the quashing of two charges preferred under Section 33(3) of the *Fisheries Act* R.S.C. 1970 c.F-14 after plea but before the merits of the charges were heard by a learned Provincial Court Judge. The stated case is in these words:

STATED CASE

1. CRESTBROOK FOREST INDUSTRIES LTD., the Respondent herein, was charged that it:

Count 1 - between the first day of July, A.D. 1976 and the seventh day of October, A.D. 1976, near Kimberley, in the Province of British Columbia, being engaged in logging operations, did put, or knowingly permit to be put, slash,

stumps or other debris into water frequented by fish, to wit: Meachen Creek, contrary to the form of Statute in such case made and provided, and

Count 2 - between the first day of July, A.D. 1976, and the seventh day of October A.D. 1976, near Kimberley, in the Province of British Columbia, being engaged in logging operations, did put, or knowingly permit to be put, slash, stumps or other debris into water frequented by fish, to wit: a tributary stream of Meachen Creek, contrary to the form of Statute in such case made and provided.

- 2. This matter was set for trial on February 27th, A.D. 1978, and the accused appeared through Counsel, M.E. Moran, Q.C. and the Crown was represented by D. Niedermayer, Esq.*
- 3. After plea, but prior to the calling of any evidence the defence made an application to quash both counts of the Information.*
- 4. Defence counsel stated that Meachen Creek was approximately twenty-five miles long and had approximately one hundred tributaries and this statement was not commented on by Crown Counsel.*
- 5. I quashed both counts of the Information on the grounds that they were defective in form and substance and did not meet with the requirements of Section 510 of the Criminal Code.*
- 6. The Crown being dissatisfied with my determination in the quashing of both counts of the Information, duly applied to me in writing on the 7th day of April, A.D. 1978, to State and Sign a Case for the opinion of the Supreme Court of British Columbia, setting forth the grounds upon which same was questioned.*

THEREFORE in compliance with that Application, I have hereby in the above enumerated paragraphs set forth the facts of the said case and do herebelow state the grounds upon which the proceedings are questioned:

- a) Did I err in law in finding that the two counts in the Information were defective in form and substance and did not meet the requirements as set out in Section 510 of the Criminal Code?*
- b) Did I err in law in accepting as a fact that Meachen Creek was approximately twenty-five miles long and had approximately one hundred tributaries, in the absence of any evidence to establish this fact?*

The offences charged are ones that are to be tried pursuant to the summary conviction provisions of the Criminal Code of Canada i.e. Part XXIV. However, by virtue of Section 729(1), Sections 510 and 512 are made applicable to summary

conviction proceedings as well. I do not propose to reproduce herein the words of the various subsections but in connection with this appeal I have considered as being applicable to this appeal, Section 510(1), Sections 510(2) (b) and (c), Section 510(3), Sections 512(f) and (g), and Section 729(2).

Section 33(3) of the *Fisheries Act* reads as follows:

3. No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.

The thrust of Crown Counsel's argument on this appeal is that:

The wording of the two counts are:

- 1) in the words of the statute or section creating the offences and
- 2) that the actions of the charged company are set out giving the accused company notice of the two transactions it is charged with.

The Crown further submitted to me it was difficult to know where the debris went into Meachen Creek and this was an ongoing operation and not just an isolated transaction.

The argument of Counsel for Crestbrook was:

- 1) That the charges were insufficient or invalid and he extensively analysed *Brodie v. The King* (1936), 65 C.C.C. 289.
- 2) That Meachen Creek is 25 miles long and has 100 tributaries.
- 3) That one cannot tell when the offences were alleged to have occurred over a four month period.
- 4) That according to *Brodie v. The King* the Court cannot order an insufficient information to be particularized or amended to make it sufficient or valid.
- 5) That the information failed to specify the mode of committing these offences.

Dealing with Mr. Moran's 5th point first, I am satisfied that the provisions of Section 512(f) are determinative against him.

With respect to the forceful argument presented on the applicability of *Brodie v. The King*, I confess to great doubts that that case is of any help at all. I do not entertain any difficulty having read Sections 33(3) of the *Fisheries Act* and the two counts involved in concluding that the transactions charged are the act or acts of putting or permitting to be put debris into Meachen Creek and one of its tributaries.

I view the problem in the light of Section 510(3) - Has the charged company been given sufficient detail of the circumstances...with respect to the act or omission...- and to identify the transaction referred to? In substance, Crestbrook complains that the vagueness and uncertainty of the time and the location where the alleged offences took place renders both counts insufficient or invalid.

The cases cited by Counsel and many more that I have researched on the sufficiency of counts or indictments are cases after a trial on the merits, or after a preliminary hearing where Counsel had some opportunity to discuss the factual issues which gave rise to the charges. Here the charges are ones that must be proceeded with under the summary conviction provisions of the Criminal Code and in the case at bar - according to the stated case the only facts discussed before the learned Provincial Court Judge were the disclosure by Mr. Moran that Meachen Creek was approximately 25 miles long and that it had approximately 100 tributaries. In my opinion, the common sense view adopted by the learned Provincial Court Judge was right and he was entitled to rely on Counsel's uncontradicted assertions concerning material facts.

Although I appreciate I must come to an overall conclusion as to whether these two counts are valid, I propose to examine the uncertainty or vagueness of time and place separately.

VAGUENESS OR UNCERTAINTY OF PLACE

Crestbrook's contention is that it does not know and cannot ascertain from the information where over a 25 mile distance it was alleged to have put slash, stumps or other debris in Meachen Creek, and into which one of some 100 tributaries it allegedly put slash, stumps or other debris. The vagueness or uncertainty of place has recently been considered by both the Ontario and British Columbia Court of Appeal. The first in point of time was *Regina v. Toronto Magistrates, Ex Parte Bassett*, [1967] 1 C.C.C. 251, but that case may be distinguishable on several bases. The second is *Regina v. Nadin* (1971) 14 C.R.N.S. 201. The majority judgment is that of Branca, J.A. and Nemetz, J.A., as he then was, concurring though there is a forceful dissenting judgment of Robertson, J.A. In that case, the accused before plea on a "impaired" charge moved to strike out the charge on the same grounds as are being argued here. In that case, the driving was alleged to have occurred at Trail, British Columbia - without further particularization. The motion to quash was not acceded to by the learned Provincial Court Judge, but was given effect to on an appeal by way of stated case, but in the Court of Appeal the majority held that the charge was neither invalid nor void. Mr. Justice Branca said at p. 204:

The lack of details as to time and place should not, in my opinion, render the charge either insufficient or void. In my judgment, assuming that the time and place were not adequately particularized, as alleged, and that further detail was required in order to ensure a fair trial, then it was quite open to the accused to ask for added detail which no doubt would have been supplied by Crown Counsel, to the accused in the Court below.

I am in respectful agreement with the foregoing reasons and propose to follow them with respect to the lack of particularity of place or location.

VAGUENESS OR UNCERTAINTY OF TIME

In coming to the conclusion that I do, I do not specifically rely on the judgment of the majority in the British Columbia Court of Appeal in *Nadin* as there the time specified was only one day i.e. the 12th of February, 1970. Here the period of time alleged is almost four months during which the commission of alleged offences occurred.

The reasons for specifying such a long period of time in my view admits for two possible explanations:

- a) The Crown does not know and cannot tell with greater precision when the offences occurred or
- b) That the Crown in alleging a series of occurrences extending over a period of time as constituting the two offences.

Crown Counsel in his reply in the hearing before me asserted that this was an ongoing operation and not just a one piece or one stump type of transaction.

The operative words of Section 510(1) and (3) are:

510(1) *Each count in an indictment shall in general apply to a single transaction*"

(3) *...and to identify the transaction referred to....*

There are many examples of multiple acts constituting one transaction such as a single rape charge where the female person is ravaged several times and sometimes by several persons. There are cases where thefts and frauds have been charged stretching over many months - where there has been a continuing scheme or plan. Authority for that position can be found in a judgment of the Alberta Supreme Court Appellate Division delivered by Chief Justice Smith in *Regina v. Kiningor and Voszler* (1972), 18 C.R.N.S. 120 where many other authorities were reviewed.

Considering the section creating the offence and the two charges here, I can readily appreciate that 1, 2, 3 or more pieces of slash or stumps allowed to be put in water frequented to fish may not be sufficient to constitute an offence. However, evidence of a course of conduct continued over a period of time may very well be an offence.

Considering as I must the combined effect of vagueness or uncertainty of both time and place I am of the opinion that the two counts are sufficient and valid charges. Under the circumstances I answer the two questions posed as follows:

- a) *Did I err in law in finding that the two counts in the Information were defective in form and substance and did not meet the requirements as set out in Section 510 of the Criminal Code?*

YES

- b) *Did I err in law in accepting as a fact that Meachen Creek was approximately twenty-five miles long and had approximately one hundred tributaries, in the absence of any evidence to establish this fact?"* NO

There will accordingly be an order reversing the quashing of the information and the case will be remitted to the learned Provincial Court Judge with this opinion and a direction that he continue with the hearing of the trial according to law.

NORTHWEST FALLING CONTRACTORS LTD. v. THE QUEEN

British Columbia Supreme Court, Toy, J., Vancouver, B.C., December 7, 1978

Constitutional law -- Attorney-General of Canada prosecuting pollution offences under federal fisheries legislation -- Offences not truly criminal in nature but still validly prosecuted -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2); British North America Act, 1867, ss. 92(14), 91(21).

Constitutional law -- Fisheries -- Federal legislation prohibiting deposit of deleterious substance in water frequented by fish -- Valid exercise of federal head of power -- Intra vires -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2); British North America Act, 1867, s. 91(12).

Information -- Accused jointly charged with another corporation -- Accused applying for prohibition on grounds that the information failed to disclose the charge it had to meet -- Accused able to bring motion to quash or application to sever in Provincial Court -- Application denied.

The accused and another corporation were jointly charged in three counts with depositing and permitting the deposit of a deleterious substance in water frequented by fish and with permitting the deposit of a deleterious substance in a place where it may enter such water. The company applied for an order to prohibit the Provincial Court Judge from hearing the trial on three grounds: first, that the Provincial Court proceedings were a nullity as the initiation and prosecution of such offences fell within exclusive provincial jurisdiction; second; that s. 33(2) of the *Fisheries Act* was *ultra vires*; and, third, that the accused was unable to know the charge that it had to meet.

Held, the application should be dismissed on all three grounds. First, the *Fisheries Act* created offences which although not truly criminal in nature could nonetheless validly be prosecuted by the Attorney-General of Canada. Second, the subsection in question was valid legislation under s. 91(12) of the *British North America Act*, 1867, having as its objective the regulation, preservation and protection of fisheries, fishing and fish. Third, the objections and complaints of the accused in claiming that it was entitled to know the charges it had to meet were properly within the jurisdiction of the Provincial Court Judge and could be dealt with accordingly by a motion to quash or application to sever before or at the time when plea was taken.

R. v. Hauser and Attorney-General of Alberta, [1977] 6 W.W.R. 501; *Miller v. The Queen* (1975), 30 C.R.N.S. 372; *The Queen v. Robertson* (1882), 6 S.C.R. 52; *Attorney-General of Canada v. Attorney-General for Ontario*, [1898] A.C. 700; *Re Fisheries Act, 1914*, [1930] 1 D.L.R. 194; *R. v. Somerville Cannery Co. Ltd.* (1927) 49 C.C.C. 65; *Mark Fishing Co. Ltd. v. United Fishermen and Allied Workers Union* (1972), 24 D.L.R. (3d) 585; *R. v. Dan Fowler*, [1979] 1 W.W.R. 285; *refd to*.

H.J. Wruck, for the Crown, Respondent
Graham Wright, for the Accused, Petitioner.

Toy, J. (In Chambers):--This is an application by Northwest Falling Contractors Ltd. for an order of prohibition directed to a Provincial Court Judge seeking to prohibit him from hearing a trial of an information containing some three counts alleging offences under Section 33 (2) of the *Fisheries Act*, Statutes of Canada 1970, c.F.-14. The information I have to concern myself with was sworn by a Mr. Raphael Scheck, a Fisheries Officer, on the 13th day of June, 1978.

The petitioner alleges that Section 33 (2) of the *Fisheries Act* is, *ultra vires*, the Parliament of Canada and that the Attorney-General of Canada on his servants or agents lack the authority to initiate proceedings or conduct the proceedings, and, accordingly, served on the Attorney-General of British Columbia a notice pursuant to the *Constitutional Questions Determination Act* R.S.B.C. (1960 c. 72). However, counsel for the Attorney-General of British Columbia has seen fit not to be represented or attend at the hearing.

Counsel for the petitioner made three forceful submissions to me:

- (1) that the initiation and prosecution of offences under the Federal *Fisheries Act* fall within Section 92 (14) of the *British North America Act* - the administration of justice of the province and accordingly the proceedings before the learned Provincial Court Judge are a nullity.
 - (2) That Section 33, sub-section 2 of the *Fisheries Act* is, *ultra vires*, the Parliament of Canada.
 - (3) that the petitioning accused company is entitled to know the charge is has to meet.
- (1) THAT THE INITIATION AND PROSECUTION OF OFFENCES UNDER THE FEDERAL "FISHERIES ACT" FALL WITHIN SECTION 92 (14) OF THE "BRITISH NORTH AMERICA ACT" - THE ADMINISTRATION OF JUSTICE IN THE PROVINCE, AND, ACCORDINGLY, THE PROCEEDINGS BEFORE THE LEARNED PROVINCIAL COURT JUDGE ARE A NULLITY

Petitioner's counsel argues that *Regina v. Hauser and Attorney-General of Alberta*, 1977 6 W.W.R. 501 is determinative of this issue in his favour. I do not so interpret that case, as only Mr. Justice Morrow's judgment, who wrote independant reasons for the majority, could be so interpreted. Chief Justice McGillivray, whose reasons were concurred in by Mr. Justice Lieberman, recognized that there was a distinction in his view between Acts of the Parliament of Canada that were criminal law and other statutes that provided penal provision not being matters of criminal law. At page 514, Chief Justice McGillivray said in part:

There are many Acts of the Parliament of Canada which as part of the enforcement of such Acts have sanctions for the violation of the Act. There are the "Customs Act", the "Excise Act", the "Income Tax Act", the "Migratory Birds Convention Act", and the "Bankruptcy Act", to mention a few; and, indeed most federal statutes have penal provisions in them. It does not follow that, because punishment for the failure to comply with such enactments is declared, the Parliament of Canada is dealing with

criminal law any more than it can be said that a province is dealing with criminal law when, as a matter of highway traffic regulations, it imposes a prohibition against driving after a conviction for impaired driving, when at the same time the government of Canada has, as a matter of criminal law, legislated so as to permit a suspension of the right to drive to be imposed as part of the penalty (Ross v. Registrar of Motor Vehicles, 1975 1 S.C.R. 5).

What we are dealing with here, however, is the "Narcotic Control Act". While the penalty imposed for duck-hunting without a licence issued under an enactment of the Parliament of Canada could hardly be regarded as a crime any more than in the provincial domain illegal parking could be so regarded, I am nevertheless of the view that there can be no doubt the "Narcotic Control Act" is clearly the subject of criminal law, and violations of that Act are indeed crimes.

In *Miller v. The Queen* (1975), 30 C.R.N.S. 372, Mr. Justice Lajoie, whose reasons were concurred in by Rinfret, J.A. and Brossard, J.A., concluded, *inter alia*, that the Attorney-General for Canada had the right to initiate and prosecute charges under the *Bankruptcy Act* of Canada, which was legislation passed pursuant to Section 91 (21) of the *British North America Act*. It is, accordingly, my view that prosecutions under the *Fisheries Act* R.S.C. 1970, c. F-14 and Amending Acts not being criminal in nature fall in the category of Acts of Parliament that the Attorney-General for Canada can initiate and instruct counsel to conduct such prosecutions.

(2) THAT SECTION 33, SUB-SECTION 2 OF THE FISHERIES ACT IS, ULTRA VIRES, THE PARLIAMENT OF CANADA.

The three counts in the information charging the petitioning company were laid pursuant to Section 33(2) of the *Fisheries Act* which can be found in the Revised Statutes of Canada (1st Supp.) 1970, c. 17 which reads in these words:

(2) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

The Parliament of Canada has passed various fisheries statutes and such legislation falls within Section 91 (12) of the *British North America Act*, the legislative head being described as "Seacoast and Inland Fisheries". Petitioner's counsel submitted that this was essentially environmental or pollution legislation and fell under the exclusive provincial authority pursuant to Section 92 (5), the management and sale of the public lands belonging to the provinces and of the timber and wood thereon, or Section 92 (13), property and civil rights in the provinces.

During the course of argument I was referred to the following authorities, which I have reviewed and considered, namely, *The Queen v. Robertson* (1882), 6 S.C.R. 52, *Attorney-General of Canada v. Attorney-General for the Province of*

Ontario, Quebec and Nova Scotia, [1898] A.C. 700; *Re "Fisheries Act"*, 1914, [1930] 1 D.L.R. 194, *Rex v. Somerville Cannery Co. Ltd.* (1927), 49 C.C.C. 65, *Mark Fishing Co. Ltd. v. United Fisherman Allied Workers Union* (1972), 24 D.L.R. (3d) 585, and a recent as yet unreported judgment of the British Columbia Court of Appeal, *Regina v. Dan Fowler*, Court of Appeal No. 770605, reasons pronounced October 16, 1978. From those cases I conclude that legislation that has as its objective the regulation, preservation, or protection of fisheries, fishing and fish is validly enacted federal legislation.

An examination of Section 33 (2) quoted above satisfies me that that section clearly has as its objective the protection and preservation of fish. It may very well be as the petitioner's counsel argued, prosecutions under Section 33 (2) may inhibit or interfere with the logging or mining industries in this Province, and that there may be validly enacted environmental or pollution legislation passed by the Provincial Legislature. I was not directed in arguments specifically to any such legislation, however, it seems to me that the words of Lord Tomlin, *Re Fisheries Act, 1914*, 1930 1 D.L.R. 194 at 196 are apt where he said:

Questions of conflict between the jurisdiction of the Parliament of the Dominion and Provincial jurisdiction have frequently come before their lord-ships' Board, and as the result of the decisions of the Board, the following propositions may be stated:

- (1) *the legislation of the Parliament of Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the Provincial Legislature by a s. 92: see Tennant v. Union Bank of Canada 1894 A.C. 31.*

It is, accordingly, my conclusion that Section 33 (2) is valid federal legislation.

(3) THAT THE PETITIONING ACCUSED COMPANY IS ENTITLED TO KNOW THE CHARGE IT HAS TO MEET

Petitioner's counsel submitted that the petitioner could not be charged as both a principal and an agent; that some of the counts involved a strict liability and others required *mens rea*; and that they were charges unknown to the law.

The three counts in the information sworn the 13th day of June, 1978 to which the petitioner, Northwest Falling Contractors Ltd. will be asked to plead are in the following words:

The informant says that he has reasonable and probable grounds to believe and does believe that Northwest Falling Contractors Ltd., and Gulf Oil Canada Limited, on or about the 4th day of April, 1978, A.D. in the County of Vancouver in the Province of British Columbia, did unlawfully deposit a deleterious substance into water frequented by fish, to wit: Cooper Reach, Head of Loughborough Inlet.

CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED

COUNT 2: The informant says that he has reasonable and probable grounds to believe and does believe that Northwest Falling Contractors Ltd., and Gulf Oil Canada Limited on or about the 4th day of April, 1978, A.D. in the County of Vancouver, in the Province of British Columbia, did unlawfully permit the deposit of a deleterious substance into water frequented by fish to wit: Cooper Reach, Head of Loughborough Inlet.

CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED

COUNT 3: The informant says that he has reasonable and probable grounds to believe and does believe that Northwest Falling Contractors Ltd., and Gulf Oil Canada Limited on or about the 4th day of April, 1978, A.D. in the County of Vancouver, in the Province of British Columbia, did unlawfully permit the deposit of a deleterious substance in a place under conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter water frequented by fish to wit: Cooper Reach, Head of Loughborough Inlet.

CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED

It seems to me that whatever objections or complaints that the petitioner has to any one or more of those three counts are matters that can properly be dealt with by motion to quash or an application to sever at or before the time when the petitioner is asked to plead to the charges. At this stage of the proceedings, in my view, such matters fall exclusively within the jurisdiction of the learned Provincial Court Judge, and they are not matters or arguments that I should accede to on an application for prohibition.

Under the circumstance I dismiss the petitioner's application on all three grounds advanced.

- Notes:
1. An appeal to the British Columbia Court of Appeal was then taken and was dismissed unanimously by judgment dated May 22, 1979. No written reasons were given.
 2. The judgment of the Supreme Court of Canada is at page 296.

**REGINA v. CANADIAN PACIFIC TRANSPORT COMPANY LIMITED AND
CANADIAN PACIFIC LIMITED**

British Columbia Provincial Court, G.H. Johnson J., Vancouver, B.C., January 10, 1979

Environmental law -- Water pollution -- Sentence -- Oil Spill -- Depositing or permitting the deposit of deleterious substance in water frequented by fish -- Twelve thousand dollar fine -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(3), 33(5).

The accused plead guilty to a charge of depositing or permitting the deposit of a deleterious substance in water frequented by fish after its employees caused the release of three hundred and fifty to four hundred gallons of oil into a harbour adjacent to its operations.

Held, the company was fined twelve thousand dollars. The accused could not have brought itself within the defence of all due diligence as the event in question could have been foreseen and prevented. Moreover, the company could have avoided the spill if it had applied the recommendations of Environment Canada in its pollution control program.

Canada Tungsten Mining Corporation Ltd. v. The Queen, unreported, N.W.T.S.C., March 5, 1976; *refd to*.

W.H. Heinrich, for the Crown.

P.L. Maughan, for the Accused.

Johnson, J:—Now in the case of *Regina v. Canadian Pacific Limited* the accused corporation was charged that at the City of Vancouver, Province of British Columbia, on or about the 17th day of May, A.D. 1978, did unlawfully deposit or permit the deposit of a deleterious substance, to wit oil, into the water frequented by fish contrary to Section 33(2) of the *Fisheries Act*, revised Statutes of Canada 1970, C.F-14 and C. 17 (1st Supplement). Now the corporation through its agent and house counsel plead guilty to this charge. The facts and circumstances surrounding the charge are as follows: On May 17th, 1978, at 1400 hours Environmental Protection Service received a call that there was an oil spill in False Creek. Officers arrived there at 1430 hours from the Protection Service and began action to try and stop it. The source was an effluent or discharge coming from the Canadian Pacific Limited properties line, traced and followed to two oil separators located on Canadian Pacific Railway Line properties on False Creek. Officers stopped the oil discharge by 1500 hours. Canadian Pacific staff were pumping oil from an old separator into a new separator and this was being done without emptying the oil from the new separator resulting in an overflow of oil from the new separator. Three hundred and fifty to four hundred gallons of an oily mixture which was a combination of lubrication oil and diesel fuel overflowed into the waters of False Creek. The oily mixture went from the separator to the storm sewer to a pipe on land and then over the abutment into False Creek. There were fifty to sixty boats moored at the False Creek Marina nearby. Approximately, ten people, six of them employees of Canadian Pacific, worked till 1400 hours May the 18th 1978, using approximately thirty-five hundred dollars worth of absorbent material to clean up the oil spill. The total cost of cleanup operations to

the Canadian Pacific Limited was nine thousand eight hundred and thirty-five dollars and one and a half days later the cleanup operation was approved by Environment Canada. The Crown served notice on the accused of its intention to seek a greater penalty under Section 33(5) of the *Fisheries Act*, by reason of the fact that the company had been previously convicted of the following similar offences: one, that Canadian Pacific Limited was convicted at Vancouver, B.C., on February the 28th, 1977 of the offence that on or about the 30th day of October, 1975, did unlawfully deposit a deleterious substance in the waters frequented by fish and received a fine of four thousand dollars; and two, that Canadian Pacific Limited was convicted at Mission, B.C. on November 30th, 1971, of the offence that on or about the 23rd day of November, 1971, did unlawfully permit the deposit of a deleterious substance in a place, to wit, at or near Inches Creek, County of Westminster, Province of British Columbia, under a condition where such deleterious substance may enter water frequented by fish and the company was fined one hundred dollars. For further consideration by the Court but not set out in the notice seeking a greater penalty were the follow admitted convictions against the corporation: June 20th 1972, in Port Coquitlam, unlawfully filling a ditch with oil, contrary to Municipal By-law, a fine of two hundred dollars; October the 19th, 1971, at Port Coquitlam, unlawfully filling a ditch, contrary to a Municipal By-law, a fine of a hundred dollars; October 10th, 1972, at Mission unlawfully did destroy fry on a spawning ground of Bell Creek on September 15th, '72, fine six hundred dollars. The penalty provisions for contravention of Section 33(2) of the *Fisheries Act* are contained in Section 33(5)(b) of this Act which reads as follows, 33(5):

Any person who contravenes any provision of (b) subsection (2) is guilty of an offence and liable on summary conviction to a fine not exceeding fifty thousand dollars for a first offence, and not exceeding one hundred thousand dollars for each subsequent offence.

Parliament has increased the maximum penalty for a first offence and for each subsequent offence to the present fifty thousand and one hundred thousand dollars respectively from a former penalty for a first offence and subsequent offence of five thousand dollars and ten thousand dollars respectively. This marked increase in the maximum fines clearly demonstrates the seriousness of the offence together with the importance of safeguarding the environment. The words of Morrow, J. are apt in the case of *R. v. Canada Tungsten Mining Corporation Ltd.* a judgment of the Supreme Court of the Northwest Territories handed down on the 5th day of March, 1976, at Yellowknife where he says on page eleven of his reasons for judgment: 'I have already observed that the behavior of the appellant (*Canada Tungsten*) when the oil leakage was found should be taken into consideration. It is important as well, however, to keep in mind the deterrent effect of convictions and resultant consequences in the present type of offence. The magnitude and impersonal nature of present day industrial mining and similar operations makes it doubly important that the penalty not be so small as to invite breaches as to make it worthwhile to gamble on not being detected, *R. v. Kenaston Drilling (Arctic) Limited* (1973), 12 C.C.C. 2nd, at 383.' Employees of Canadian Pacific Limited were in the act of emptying the oil separator when they realized that the oily mixture of lubrication oil and diesel fuel was escaping from the separator and entering the waters of False Creek. False Creek has some fish in it and it is used by the public primarily for boat mooring and it is bounded partly by some

industrial and some residential properties. As soon as the overflow of oil from the separator was discovered, the employees of Canadian Pacific Limited acted responsibly and with dispatch and succeeded in stopping the discharge after approximately one hour and the deposit of approximately three hundred and fifty to four hundred gallons of the oily mixture into False Creek. The cleanup began immediately in cooperation with Environment authorities and one and a half days later Environment Canada approved the cleanup. The total cost of cleanup was as indicated by Canadian Pacific Limited at nine thousand eight hundred and thirty-five dollars. The company also installed a floatable oil boom in to False Creek at a cost of two thousand dollar to contain any spill. The Crown in serving notice seeking a greater penalty by reason of the previous similar convictions of the company is critical of the pollution abatement proposals and steps taken by Canadian Pacific. The Crown cites exhibit two, the letter from the Regional Director of Environment Canada to the Superintendent of C.P. Rail dated February 2nd, 1976, outlining six steps that Environment Canada recommended that the company incorporate in its pollution abatement program. It is apparent that if the company had followed these suggestions the overflow of the oily mixture would not have occurred because the primary cause of the overflow from the oil separator was the excess storm water rain runoff that occurred just prior to the spill. Two days earlier, on May 15th, 1978, Vancouver had a near record rainfall of twenty-seven point two millimeters from dawn to dusk of that day. At that time a crew of men from Canadian Pacific came once a month and pumped out the oil separators and emptied them. Now the company empties the two oil separators every two weeks. The new oil separator that had just been installed by the company prior to the spill cost the company eighty thousand dollars. The water runoff from rainfall goes into the storm sewer and then into the separator and because of the near record rainfall the oil separator was severely taxed and the monthly emptying of the oil separators was not frequent enough to cover unusual taxing of the system through heavy rainfall. The company has two previous convictions as I indicated and the company has other convictions breaching Municipal By-laws pertaining to the protection of the environment. At first glance this prior record of the company could indicate a history of noncompliance with pollution control laws, however, I'm satisfied that that is not the case and that Canadian Pacific Limited is sensitive to the serious nature of pollution offence and are most concerned about being a good corporate citizen. This company is the largest company in Canada and one of the largest in the world and has twenty-five thousand employees that it must educate, supervise and control in relation to the importance of the protection of the environment. Some mistakes are bound to occur and likewise a lack of due diligence in preventing an oil spill does happen. While in the case at bar an unusual rainfall triggered the oilspill, nevertheless with due diligence it could have been foreseen and prevented. I hereby impose a fine against the company in the amount of twelve thousand dollars and in default of payment, distress.

REGINA v. UNITED KENO HILL MINES LIMITED

Yukon Magistrate's Court, Horembala, Dep. Mag., Whitehorse, Y.T., January 19, 1979

Environmental law -- Water pollution -- Sentence -- Failure of tailings dam -- Deposit of deleterious substance in place where may enter water frequented by fish -- Fine of ten thousand dollars -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

The accused entered a plea of guilty to a charge of depositing a deleterious substance in a place under conditions where it may enter water frequented by fish. The offence occurred when a dam which held back effluent from the accused's tailings treatment pond burst, releasing 11.8 million gallons of effluent into a nearby creek.

Held, the accused was fined ten thousand dollars. While the quantity of effluent released was very large, the incident had not been shown to have occurred because of negligent conduct by the company. In addition, this was the first offence of this kind for the accused, and it took remedial measures promptly after the incident occurred.

W.H. Corbett, for the Crown
D.H. Searle, Q.C., for the Accused.

Horembala, Dep. Mag.:--United Keno Hill Mines Limited has pleaded guilty to an offence that they did deposit a deleterious substance in a place under conditions where such a deleterious substance may enter the waters frequented by fish, to wit, the South McQuesten River, near Elsa, Yukon Territory, contrary to Section 33(2) of the *Fisheries Act*. The relevant facts, as I find them, are as follows:

Some time late in the afternoon of the day in question between 4:00 and 5:00 p.m., the dam holding back effluent from the treatment pond at the company's mine site burst, releasing into Flat Creek, which flows into the South McQuesten River, which itself empties eventually into the Yukon River, some 11.8 million gallons of effluent containing various amounts of zinc, cadmium, and copper and other minerals into this water system in a span of approximately one hour. Prompt action was taken by the company officials and that resulted in a temporary dam being in place by the evening hours at that day. The following day, in consultation with environmental and fisheries officials, the dam was repaired in a permanent nature. The ecological damage to the water system described is incalculable at this time. Although investigation of the said water system revealed that no dead fish were found, nevertheless, the evidence of Mr. Hoos, an environmental expert, was impressive with respect to the long-term effects on the growth and reproduction of fish; and that is the greatest concern from the stand-point of the environment and there can be no doubt whatsoever that the presence of these minerals in the water system is deleterious to the fish. It has been suggested by the Crown that the cause of the dam burst was as a result of the improper replacement of materials forming part of the dam structure in the spring of 1978. These materials were either ice-covered or snow-covered and were put in place after the removal of part of the structure of the dam in order to assist the removal of a D-8 Caterpillar that had been trapped in the ice. On the evidence before me, particularly that of Mr. Bennett from the company, who stated that the dam appeared to burst, not from the top of the structure, which contained the new materials, but from the bottom; and also the fact that the ice or

snow-covered materials may or may not have better compactability, I am not satisfied that it has been established that the replacement material was the cause of the break in the dam. It has also been suggested by the Crown that by using the machinery in question, that is, the caterpillar, to investigate seepage in April of 1978 the company was alerted at that time to a possible weakness in the dam structure. The evidence disclosed that the caterpillar was placed on the treatment pond for the purpose of digging trenches in the ice to help with the precipitation out of solids from the tailings pond in the spring months when the ice was still on the treatment pond. This was done every year, and that was the primary function for the machinery being on the ice. The caterpillar commenced an exploratory excavation in the general area of the apparent seepage and became subsequently trapped in the ice. The seepage that was revealed was not new, but apparently evidenced itself each and every spring, and its source was not necessarily from the dam structure but could possibly have been from the surrounding swampy area. On the basis of that evidence, it has not been established to the satisfaction of this Court that the Crown's submission in this regard is valid and one that the Court can act upon.

The final submission made by the Crown with respect to the penalty involved the lack of an emergency plan or back-up system, and it points to the fact, amongst other things, that the tailings pond was kept at full capacity and that also, a temporary plug was not installed in the tailings pond dam at the time of the incident. I am satisfied from the evidence in this case by Mr. Smith that maximum efficiency in the treatment system is achieved when the tailings pond is filled completely with effluent, and I am also satisfied that the installation of a temporary plug in the tailings pond would incur a risk to the tailings pond dam and would not be a prudent course of action with respect to this incident.

Turning now to the appropriateness of the fine. In September of 1977, the legislation was amended to increase the maximum fine ten-fold to a maximum of fifty thousand dollars to reflect the public concern with industrial pollution and its damage to the environment. The Crown has suggested a fine in the mid-range and says that it is justified in this case. I am assisted in determining the appropriateness of the fine by the case of *Canadian Pacific Limited*, decided on December the 7th, 1978, in Vancouver. Written Reasons for Judgment have been requested, but they have not yet been handed down. That was a case involving the spillage of four hundred gallons of crank-case and diesel oil into False Creek in the waterfront area of the City of Vancouver. In that case, the accused corporation had been previously convicted of a similar offence and had disregarded environmental agencies' warnings regarding the possibility of a second spill. Provincial Court Judge G.H. Johnson imposed a fine in that case of twelve thousand dollars. That case also disclosed that the company had spent approximately nine thousand dollars in cleanup costs. The distinguishing features of the case before me are as follows:

- (1) Unlike the Canadian Pacific Case, a substantially greater volume, that being 11.8 million gallons of deleterious substance was released into the environment.
- (2) On the other hand, from the accused' corporation's standpoint, the evidence in this case disclosed that the company acted promptly to the emergency .

- (3) On the findings of this Court, there was not any negligence that could be attributed to the company in any way regarding this burst in the dam.
- (4) This corporation has not been previously convicted for any pollution statute or ordinance, and the evidence here disclosed that the company officials acted promptly and have co-operated with the various environmental officers and agencies.

Having said that, the courts, particularly in the north, have generally imposed substantial fines, because of the precarious nature of the environment and in order to stress the deterrent element of environmental offences. The Court wishes to say this. The accused corporation now stands convicted of a pollution offence. It is also now aware of the possible structural weakness in the damming system employed at its mine-site; and in effect, is now put on notice that any future failure of the dam and possible conviction of a similar offence would be treated by the courts as extremely serious. But keeping in mind the findings of this Court in this case, the public interest would be served with the imposition of a fine in the amount of ten thousand dollars. In default, distress of the accused corporation. The fine will be payable on or before February 16, 1979.

REGINA v. TEXACO CANADA LIMITED

Nova Scotia Magistrate's Court, McCleave, J., Halifax, May 31, 1979

Environmental law -- Water pollution -- Oil Spill -- Deposit of deleterious substance in a place under conditions where may enter water frequented by fish -- Accused's inspection procedures not adequate to show it exercised all due diligence -- Causal break in pipeline foreseeable -- Oil a deleterious substance -- Water frequented by fish -- Accused convicted -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(8).

Constitutional law -- Fisheries -- Water pollution -- S. 33(2) intra vires -- Valid exercise of federal power -- British North America Act, 1867, s. 91(12).

The accused was charged with the unlawful deposit of a deleterious substance in a place under conditions where it may enter water frequented by fish contrary to s. 33(2) of the *Fisheries Act* after twenty-nine thousand gallons of furnace fuel oil escaped from the accused's plant when part of an underground pipeline failed. The oil flowed through a sewer into Halifax Harbour.

Held, the accused was found guilty. The totality of the evidence established that the accused had not acted with all due diligence and therefore had not satisfied the reverse onus required for acquittal on a strict liability offence. In particular, the company's inspection procedures failed to address the possibility of an underground pipeline rupture, which was found to be a foreseeable event. The accused was responsible for the natural consequences of its negligence, once the oil escaped its control. Through the application of the statutory definitions and the receipt of evidence, the water in question was found to be frequented by fish. The oil in question was found to be a deleterious substance.

R. v. Canadian Forest Products Ltd. (1978), 7 C.E.L.R. 113; *R. v. MacMillan Bloedel (Alberni) Limited* (1978), 7 B.C.L.R. 210, 7 C.E.L.R. 128; *R. v. The Corporation of the City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 253; *R. v. Pierce Fisheries Ltd.* (1970), 12 D.L.R. (3d) 591; *R. v. Standard Oil Company of British Columbia Limited*, unreported, B.C. Prov. Ct., November 18, 1974; *Canada Tungsten Mining Corporation v. The Queen*, (1976) 5 C.E.L.N. 120; [1976] W.W.D. 104; *R. v. B.C. Forest Products Ltd.* (1976), 5 C.E.L.N. 7; *R. v. Imperial Oil Enterprises Limited*, unreported, N.S. Mag. Ct., March 6, 1978; *refd to*.

Subsection 33(2) of the *Fisheries Act* is a valid exercise of the exclusive federal power under s. 91(12) of the *British North America Act* and therefore is *intra vires*.

Northwest Falling Contractors Ltd. v. The Queen, unreported, B.C.S.C., November 6, 1978; *folld*.

B. Burgess, for the Crown.

J. Merrick and R.L. Barnes, for the Accused.

McCleave, J.:--In mid-December of 1977 there was a substantial loss of furnace fuel oil from a bulk storage tank owned and operated by Texaco Canada Inc. at 3617 Barrington Street, Halifax. A considerable quantity escaped into Halifax Harbour near Pier 9 and as a result the Texaco Company was charged that:

On or about the 13th day of December, 1977, did at or near the Texaco bulk plant near Pier 9, City of Halifax, County of Halifax, Province of Nova Scotia, unlawfully deposit a deleterious substance, to wit: Oil in a place under conditions where such oil may enter the waters of Halifax Harbour being waters frequented by fish, contrary to Section 33 (2) of the Fisheries Act, Revised Statutes of Canada, 1970, Chapter F-14, as amended, and did thereby commit an offence under Section 33 (5) of the said Fisheries Act.

At the trial held in Court Room 1 at the Law Courts February 26th through 28th, 14 witnesses were heard - 13 called by the Crown - argument was made and decision reserved. The Court has anxiously considered the various legal issues raised, most particularly the elements of strict liability as they have been generated from the landmark decision of the Supreme Court of Canada in *R. v. Sault Ste. Marie*, the defence of due diligence, and the effect of recent amendments to the *Fisheries Act* relating to what constitutes a "deleterious substance".

The legal issues were presented by Mr. Burgess for the Crown and Mr. Merrick (with whom was associated Mr. Barnes) for Texaco. It is convenient to itemize them and then deal with each one and the relevant evidence in turn.

- FIRST - THE CONSTITUTIONALITY OF THE FISHERIES ACT
- SECOND - WAS HALIFAX HARBOUR A HABITAT OF FISH?
- THIRD - WAS THE FURNACE OIL AS DEPOSITED IN THE HARBOUR DELETERIOUS?
- FOURTH - DID THE FURNACE OIL ESCAPE UNDER SUCH CIRCUMSTANCES AS TO MAKE TEXACO GUILTY OF THE CHARGE?

FIRST - THE CONSTITUTIONALITY OF THE FISHERIES ACT

Mr. Merrick advanced the argument that the *Fisheries Act* would be *ultra vires* if it sets arbitrary standards, which could in effect render it an act dealing with pollution. The Court has studied the various provisions of the *Fisheries Act* and respectfully agrees with Mr. Justice Toy's opinion in *Northwest Falling Contractors Ltd. v. R.* that

legislation that has as its objectives the regulation, preservation or protection of fisheries, fishing and fish is validly enacted Federal legislation. An examination of Section 33 (2) satisfies me that that section clearly has as its objectives the protection and preservation of fish.

This decision, in the British Columbia Supreme Court, was handed down December 7, 1978.

I am therefore of opinion that the section in question is *intra vires* since it is within Section 91(12) of the *British North America Act*, "Seacoast and Inland Fisheries".

SECOND - HALIFAX HARBOUR AS A HABITAT OF FISH.

Section 33 (2) as enacted by Chapter 63, Acts of 1969-70, deals with deposits "in water frequented by fish" and Section 33 (11) defines this phrase to include "all waters in the fishing zones of Canada". There was evidence at the trial, not seriously challenged that is the basis for my finding that Halifax Harbour is water frequented by fish. Alternatively, I would have to consider that the Harbour is within a fishing zone of Canada giving "zone" its natural meaning - the word does not appear to have been defined in the *Fisheries Act*, although I have found it mentioned in the *Fisheries Act*, Section 2, definition of "Canadian fisheries waters" and in chapter 63 in Section 34.4, "coastal waters of Canada".

The evidence I have referred to came from Wayne Leslie Pierce, a biologist with the federal Environmental Protection Service, Wayne Gordon Pelly, a chemist with the same service, Peter J. Wells, an aquatic biologist with the Federal Department of the Environment, Dr. John Henry Vandemeulen, marine zoologist and biologist, and Colin Duerden, Regional emergency co-ordinator for Environmental Protection Services.

(I might also note parenthetically that my brother provincial magistrate, Judge R.E. Kimball, in a similar case involving *Imperial Oil Enterprises Limited*, handed down a decision on March 6th, 1978, and found that the waters of Halifax Harbour fit the definition of "waters frequented by fish". The events in that case occurred May 29, 1977).

THIRD - WAS THE FURNACE OIL AS DEPOSITED IN THE HARBOUR DELETERIOUS?

The Court had the benefit of expert evidence from both sides on the question as to the effect of furnace oil on Halifax Harbour. It is obvious from the evidence that the oil had spread and eventually was dissipated. The Court does not however find that the situation was similar to one faced by Judge Kimball in the case referred to previously. There the Court had no evidence to satisfy it that there was enough oil in relation to the amount of harbour water to make the oil deleterious. As he noted,

"it's irrational to take the position that a mere drop of oil lying on top of a water, a large body of water, would make that deleterious."

The Court notes that Section 33 (12) of the *Fisheries Act*, as enacted by chapter 63, Acts of 1967-70, provides that the Governor in Council may make regulations prescribing concentrations of substances which would in effect create a deleterious substance as defined in Section 33 (11). No such regulation has been drawn to my attention although there are more than nine pages of references to regulations under this *Act* in the Consolidated Index of Statutory Instruments published in Part II of the Canada Gazette, covering the period between January 1, 1955 and September 30, 1978.

(Most regulations concern Provinces or areas of Canada, a considerable number concern specific species such as Atlantic herring and Fraser River salmon, some deal

with seasons for fishing operations, and a few are related to environmental-pollution aspects: landfilling on the Fraser River, Chlor-alkali mercury liquid effluent, meat and poultry products plant liquid effluent, metal mining liquid effluent, petroleum refinery liquid effluent, potato processing plant liquid effluent, pulp and paper effluent and a number dealing with gravel and logging).

The Court considered the definition of "deleterious substance" as enacted in the 1969-70 amendment and further amended in 1976-77 by chapter 35.

any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water.

In this area of law, one of the most experienced judges is His Honour J.S.P. Johnson of the British Columbia Provincial Court. I will be dealing with two of his decisions later, but refer to one now - *R. v. Canadian Forest Products Limited*, decided June 1, 1978 since it deals with the question of proof of "deleterious substance".

He noted at p. 4 of his 14 page decision:

Taking into consideration the familiarity of persons with gasoline and oil products in every day life and the national and international concern with oil pollution, it may be that a Court might be able to take the judicial notice that oils, gasoline and other hydro-carbons were deleterious substances, but I need not do that in this case as there is more than sufficient evidence for me to find that the oil deposited by the company was a deleterious from the evidence presented.

And he noted at p. 8 that

The Crown is not required to prove that the substance deposited was deposited in such a manner that the concentration at the time of deposit was or could be deleterious to fish.

Then quoting himself from another decision, he continued,

...the Crown need only prove that at some time the water is frequented by fish and that gasoline is a deleterious substance and that the accused did permit the deposit thereof.

Then, summing up this observations on the effect of the amended definition, Judge Johnson wrote at p. 10:

I find that it is not necessary for the Crown to prove that the substance deposited was of such a concentration, or attained such a concentration in the water, in this particular case, that it was deleterious to fish, but only that it is known to be a substance which is deleterious to fish.

British Columbia provided yet another case which was considered by the Court in determining the issue arising from the allegation of the deposit of a deleterious substance. *R. v. MacMillan Bloedel (Alberni) Limited* was decided in the Court of Appeal of that province on April 5th, 1979, and was brought to my attention by counsel after the original argument was completed.

There 170 gallons of bunker C oil spilled during unloading at the company's deep sea dock, because a suction valve was not closed properly. The company acted quickly to clean up.

The Court, Messrs. Justices Bull, Seaton and Carrothers, through Mr. Justice Seaton, dealt with the definition in this way:

What is being defined is the substance that is added to the water, rather than the water after the addition of the substance. To re-phrase the definition section in terms of this case, oil is a deleterious substance if, when added to any water, it would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that water is rendered deleterious to fish or to the use by man of fish that frequent that water. Applying that test to the findings of fact here, bunker C oil is a deleterious substance. Once it is determined that bunker C oil is a deleterious substance and that it has been deposited, the offence is complete without ascertaining whether the water itself was thereby rendered deleterious. I do not think that the words "that water" in the definition section mean the water into which it is alleged the accused deposited the substance. Those words refer back to "any water", at the beginning of the definition; the hypothetical water which would degrade if the oil was added to it.

The witnesses in this area were Dr. Peter J. Wells, an aquatic biologist with the Department of the Environment, Dr. John Henry Vandemeulen, a marine zoologist and biologist, and, called by the defence as its only witness, Dr. Gilles La Roche, a biochemist with the Marine Sciences Centre at McGill University. Each was found qualified by the Court to offer opinions as to the effects of oil upon fish and the fish habitat.

When they formulated opinions, it was necessary that each found these on specific factors. For example, Dr. Wells considered the weather, water temperatures, organisms present, their distance from the shoreline, whether the oil is emulsified or floating or dispersed or stirred, whether the living matter affected would be killed or grow in a different way or discharge the component. Dr. Vandemeulen considered the sub-lethal effects, the metabolism, growth, feeding ability, ranges or concentration, including a threshold range, whether a compound was normally part of the current and the solubility of the oil. Dr. La Roche considered changing conditions of the environment, discernible effects, whether effects were stimulating or toxic, the time of contact and the concentration, evaporation and weathering, winds, his belief that concentration or uptake should not be related to toxicity, whether the environment were static or natural, the difficulties of determining concentration at low levels of water, and the mobility of fish.

The weight of evidence of these scientists does not hang on any question of credibility, although I did consider that Dr. La Roche was over-zealous in qualifying

his answers. Be that as it may, other judges could weigh their evidence as well as I could at trial by reading the transcript.

Before making my finding, I will deal at greater length with the question as to whether it was Texaco furnace oil found in the harbour. The evidence included 10 samples of oil (C.1 through C.9 and C.13) which were analysed by Wayne Gordon Pelly, a chemist with the Environmental Protection Service.

Similar samples were:

- C.1 from Texaco's storage tank
- C.3 from the sewer outlet into Halifax Harbour
- C.7 from near Jetty four
- C.8 from Pier 9
- C.9 from the diked area at the Texaco plant

Dissimilar samples were:

- C.2 from the tanker 24th of February at Pier 9
- C.4, 5 and 6 from HMCS Preserver
- C.13 from a storage tank of Petro Fina

The defence had opportunity to study the scans made by Pelly in carrying out his analyses. There is no doubt but that the greater quantity of oil found on Halifax Harbour December 14th came from Texaco.

It was useful, however, to consider the rate of flow of the oil before making this finding.

The witness James Edward Currie, a Texaco employee for 19 years, put the loss at 29,032 gallons after the company carried out its daily reconciliation process. The reconciliation was normally carried out at 7.30 or 8 in the morning. The previous reconciliation showed a shortage of 300 gallons.

Trucks would normally load at around 285 gallons per minute, according to Mr. Currie.

Wayne Leslie Pierce, the informant in this matter and a biologist with the Environmental Protection Service, described looking in the dike, and seeing a stream of oil running across the floor into a catch basin. As is obvious from the photographic exhibits, this was immediately south of the paved area for truck loading, and at a lower level. Pierce estimated the flow at 10 gallons a minute and said it was running out as fast as it was running in. He captured some (C.9).

Another Crown witness, Patrick McGonigal, marine surveyor with the Coast Guard, saw oil coming out the two foot sewer outlet, and captured some (C.3). He described the flow as 15 gallons a minute at least.

Pierce and McGonigal gave evidence as to the spread of oil on the harbour. On the 14th the latter flew over the harbour in a helicopter and saw oil from the A. Murray MacKay bridge to Imperoyal and Point Pleasant Park.

Considering all the evidence - scientific and lay - I find that a deleterious substance, furnace fuel oil, came from the Texaco plant onto Halifax Harbour. My principal ground is the rate of flow observed pouring into the harbour at the sewer outlet.

FOURTH - THE QUESTION OF LIABILITY

The amendments in Chapter 63 of the Acts of 1969-70 provided, by what became Section 33 (8) of the *Fisheries Act*, that

it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

I shall consider several cases later which deal with "due diligence".

On May 1st, 1978, Mr. Justice Dickson on behalf of an unanimous Supreme Court of Canada presented the landmark judgment in *R. v. The Corporation of the City of Sault Ste. Marie*. In this case all counsel have proceeded on the basis that the question of a breach of the Section 33 of the *Fisheries Act* fits the 2nd category set out in that decision.

It is therefore appropriate to consider those portions of the judgment applicable here (I shall refer to the page numbers in the 35 page copy available to me).

Category two is set out at p. 28 - "Offences in which there is no necessity for the prosecution to prove the existence of *mens rea* the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused took all reasonable steps to avoid the particular event."

And, he notes further on the same page, "the principle that punishment should in general not be inflicted on those without fault applies".

The key words in the section which I am considering are "shall deposit or permit the deposit." At page 32 of *Sault Ste. Marie* Mr. Justice Dickson has helpful thoughts on direct acts of pollution. "The causing aspect centres on the defendant's active undertaking of something which it is in a position to control and which results in pollution. The permitting aspect of the offence centres on the defendant's passive lack of interference or, in other words, its failure to prevent an occurrence which it might have foreseen."

The judgment considers the defence of due diligence in its concluding paragraphs. One question to be answered, as I read the third last paragraph, is

...whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

In an earlier part of the judgment at p. 24, Mr. Justice Dickson refers to the element of control, and quotes various opinions as to its ingredients. The samples he notes are: supervision, inspection, improvement of business methods, exhortation of employees, pressure upon the thoughtless and inefficient, keeping organizations up to the mark, reasonable influence of control. (A consideration of the Supreme Court decision in *R. v. Pierce Fisheries Ltd.* [1971] S.C.R. 5 followed and it is a useful study as to how these elements could be considered in the operation of a fish plant).

For the purposes of this decision I think that is a sufficient consideration of *R. v. Sault Ste. Marie*, except to note that I make a finding that no wilful behaviour by any person is in question here.

What is the burden of proof then on Texaco? And the overall burden? As stated in *Sault Ste. Marie*.

While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care. (P. 28).

And I have noted earlier the Act itself provided that the Defendant can escape liability by establishing that he "exercised all due diligence."

In short, I must weigh the evidence and decide, on a balance of probabilities, whether Texaco established that it exercised all due diligence.

Now, a consideration of the facts. Texaco, as I will refer to Texaco Canada Inc., runs and operates a bulk storage plant at 3617 Barrington St., Halifax. On December, 14th, 1977, there was a break in its pipeline system, and furnace oil escaped in huge quantities as much as 29,000 gallons. Some of this escaped from a compound, flowed along a ditch between the Texaco plant and a railway track, and found its way to the harbour through a sewer outlet.

Texaco's chief engineer for the Atlantic region, Jack Arnold Rohrer, said that the source of the leak from the pipeline system was through a cast iron pipe fitting, cracked at its flange, which was located 38 inches below surface level. The fitting was part of the delivery system from the storage tanks to the loading area for delivery trucks.

In the summer of 1977, certain modifications were carried out at the plant. Two of the three storage tanks were relocated. The discharge in question came from the middle one, about 150 feet from the cracked flange. Donald Potter, the assistant superintendent for Texaco, had been present when the parking area was filled in. He said the pipe was laid into a bed of crushed stone, and the flange was within a few inches of the retaining wall. Another modification was the paving over of the loading area for the trucks which included the cracked flange.

About the year 1939, Texaco's predecessor - the McColl-Frontenac Company - had spent considerable funds to endyke the storage compound, and Texaco had since constructed facilities. Rohrer, whose background included construction engineering for Texaco for approximately 10 years, said that the dike was in reasonable condition, and could be expected to contain a massive spill. There were three small holes in the

dike wall to allow the release of rain water. To his recollection, there was no drain in the dyked area. The cast iron valves were considered to be safe, amongst the safest in the industry.

The weather had been exceptionally cold for December, and Rohrer said that frost was found when the cracked flange was excavated. The flange was 38 inches below the surface and 3 inches from the retaining wall. Rohrer said it was highly unusual to find frost to that depth so early on in the winter, and there should not have been any frost around the pipe.

The Court asked him if he could assess the cause of the crack and in order he gave differential stress, material fatigue and Act of God.

Could the break be foreseen? I have to think that this is really not a matter when an Act of God is a defence, since the Almighty can be expected to provide Halifax with cold weather at some time during the winter. In this case, the low temperatures came early. The one new factor that had interposed since the previous winter was the digging up and packing, then paving the loading area. Had this set up new strains upon the valve which cracked? I have to think that this is a factor I must consider.

The defence position is that there was nothing to indicate that such a leak should have been foreseen. The Crown argues that Texaco did not take all reasonable care, and points to these facts to support this condition: the enormous loss of oil before detection which indicated a lack of proper monitoring procedures, the leaving open of drains inside the dike, the lack of knowledge of three senior employees of the drains outside the dike into which the oil could flow, the dyke wall did not contain the oil indicating a lack of proper care in maintenance, and there was the change in the parking area which created new conditions.

The Court therefore turns to some of the cases involving oil escapes and section 33 (2) of the *Fisheries Act*.

- (1) *R. v. Standard Oil Company of British Columbia Limited*, tried by Judge J.S.P. Johnson on November 18, 1974, with decision on January 20, 1975, in the provincial court of British Columbia. Gasoline had escaped from a bulk tank on to the clay floor of the bulk plant and then through a cement wall into the harbour. He considered the defence of "due diligence" provided by s. 33 (8) and said in part it meant

...due diligence in the construction, maintenance and inspection of the installation.

He found that the gasoline had escaped through a hole in the cement wall and said

the onus was on Standard Oil to prove that they did exercise all due diligence to prevent that hole being in the wall and thus prevent the gasoline spill; they did not discharge that onus.

Judge Johnson also has some opinions, clearly recognized by him as *obiter dicta* that

it may be that the person is required to prove not only that the installation was properly constructed and maintained, but that which was constructed was the best and most advanced construction possible to prevent the environmental damage. It may not be enough to say a cement retaining wall was built to prevent a gasoline spill without additionally proving that a cement wall was the best type of construction to prevent the spill.

- (2) *Canadian Tungsten Mining Corporation Limited v. R.* was decided by Mr. Justice Morrow of the Supreme Court of the Northwest Territories, on appeal *de novo* from Deputy Magistrate L.S. Ekhardt. Judgment was given in March, 1976. Oil was found on a river some distance below the oil storage tank of the accused, and it was first thought the oil had escaped from the tank. It was subsequently discovered that the oil had leaked from a fuel pipe which was part of the fuel distribution systems supplying heating oil from the storage tank to several buildings. As noted, "it had been completely closed and insulated until opened for the inspection. There had been no metering system or regular pressure tests in effect designed to detect any oil leakage from the tank or pipe." The defence raised was that the accused "exercised all due diligence to prevent its commission..." s. 33 (8) of the *Fisheries Act*.

Mr. Justice Morrow said

to avoid liability the appellant must couple lack of consent with a behaviour or consciousness which in effect shows it was not blind to the consequences of the possibility as well as the consequent danger of a leakage such as is found in the present case.

And later he found "due care and diligence" would refer to preventing the leak and not the correcting the leak or reducing the damage.

It is quite true, as was argued, that to prevent the leak in the present case, to set up inspection to look for weaknesses in the installations such as are found at appellant's plant may be difficult. The fact of the matter is that no such tests appear to have ever been made since the plant was erected, and certainly no routine ever laid down for opening the packing around the offending pipes to see if erosion was taking place.

The plant, he noted, was in an area where extremes of climate are common. There was a primary responsibility for proper installation, repair and maintenance as well as inspection upon the accused. The conviction was upheld, although the fine was varied.

- (3) *R. v. British Columbia Forest Products Ltd.* was a trial *de novo* before Judge Cashman of the British Columbia County Court on June 17, 1976. The accused had used a substance known as Oilsperse 43 into waters to clear up an oil spill - the polluted waters were boomed. The substance was a new product and its drum contained no directions for its use. The Crown contended that Oilsperse 43 was

a deleterious substance, but the Judge concluded that it always remained on the surface of the water and said:

If that is so, there is no evidence as to the effect on fish or other marine life.

The charge was dismissed. The learned county court judge did not consider the effect of s. 33 (8), or if he did it was not mentioned in his judgment.

- (4) *R. v. Imperial Oil Enterprises Limited* was decided by Judge R.B. Kimball of the Provincial Magistrate's Court in Nova Scotia on March 6, 1978. Oil had escaped from the accused's refinery on the shore of Halifax Harbour. The accused was found not guilty on the point that it was not established beyond a reasonable doubt that the quantity which escaped in relation to the area it spread on was deleterious to fish. Much of Judge Kimball's judgment concerned this question of concentration. The final six pages of his 40 page judgment involve consideration of the defence of due diligence.

He thought that the oil had escaped in the quantity it did "because of the failure of the operator of the separator and the shift foreman to have detected the oil in the boom area... at a time when its detection would have prevented the accumulation of the oil in the quantities to which it did accumulate." Each had made a cursory visual inspection of the boom area "at a time when they each had a knowledge of an unusually large quantity of oil within the separator." Judge Kimball considered that they were acting with less than due diligence when they did not carry out further observation. He said that the defence of due diligence provided in s. 33 (8) could not be relied on by the company. He acquitted however on the sole point that there was lack of proof that the deposit of oil was deleterious.

- (5) In *R. v. Canadian Forest Products Ltd.* Judge J.S.P. Johnson of the provincial court of British Columbia made a decision on June 1, 1978. The oil spill had resulted from the rupture of an oil pipe, the oil moving into the mill sewerage system and then into a channel. The split in the pipe was caused by wear from vibration. Due diligence was raised by the defence, the company claiming that an accident had caused the spill.

Judge Johnson considered the facts and found that the rupture could have been anticipated by the company, because the pipe line was hanging on a bracket and was subject to wear from vibration. Also there was a sewerage outlet ten feet from the oil spill line. He likened this case to the *Tungsten* case noted previously.

To understand the leakage, the bulk storage layout was: A load line from the harbour at Pier 9 to the bulk storage tanks; pipes from the tanks passing through valves, through open air in the dyked compound, through a wall alongside the paving area referred to, under that paving area and passing through a valve, and to the loading area for the delivery trucks near the parking area. (The photograph exhibit N-2 shows the latter part of the piping from the tanks as it enters the wall supporting the parking area. The delivery truck area is just to the left, but outside the picture).

One notes several changes of course in the flow of oil between the tanks and the pumps serving the delivery trucks.

The valves near the storage tanks were of a safe construction, and were there to stop any free flow of oil - they could operate only, as Mr. Rohrer said, when there was a truck being loaded at the other end. In other words, the loss of oil could only occur when these power chamber valves had been opened because trucks were being filled.

Each morning the company would make a reconciliation of its oil in storage. On the morning of the 14th, when the reconciliation was made by Donald Potter, the assistant superintendent, between 7.30 and 8, the reconciliation showed a loss of 300 gallons over the previous 24 hours - a figure not considered unusual because of the extreme cold and other factors. The next reconciliation, taken on the morning of the 15th, showed a loss of 29,032.

The total loss of 29,032 gallons had not taken place on the full day, however. It took place on the morning of the 14th, while trucks were being filled, until the moment when James Edward Currie, manager of the plant, noticed oil spurting from three holes in the wall at the east side of the property, and he had the pump supplying the trucks shut off and closed all the valves. This took place sometime before 3 p.m.

It might be noted that the tanks could be filled at rates of 285 gallons per minute, and the oil spurts - through holes from 1.1/4 to 1.3/4 inches - cleared some 12 to 15 feet of track before landing in a ditch between two sets of railway tracks. From then the oil ran southerly along the ditch, and into a rock (or French) drain, going underground.

In addition to the spurts of oil through the three holes, which were located in the wall immediately alongside the paved in area, (see the right portion of the wall in D.3) there was also a substantial flow of oil in the open area immediately south, shown at the middle of D.2, the bottom right of D.1 and in D.31. The informant, Wayne Leslie Pierce, a biologist with the Environmental Protection Service, told of visiting the Texaco plant early in the afternoon of the 14th - the time would be between 2 and 3 o'clock - and observing what he called a stream of oil, like a small stream or brook, flowing at a rate he estimated to be 10 gallons per minute, along the dyke floor into a catch basin. He took a sample in a bottle, C.9.

It is clear beyond any question that the spurts of oil through the wall flowed along the ditch and down the French drain. It is possible that the oil which disappeared into the catch basin inside the dike augmented this flow. In any event, the flow of oil from the old sewer outlet into the harbour continued for some time and Mel O'Leary of Cyril Dauphinee Limited, who managed the clean-up, estimated between 3,000 and 4,000 gallons of oil were taken out in 15 days.

It is clear that the escape occurred over a period of some seven or eight hours, and that the Texaco employees did not take action until Mr. Currie ordered the valves to be closed. It is also clear that the Texaco employees were not aware that the ditch outside their plant led to a drain into the harbour. It is also clear that the events of the leakage, so evident from the evidence assembled afterward, were clouded at the time by the fact there were other but small oil spills on the 13th from non-Texaco sources which were traced as to their source by government agencies.

Has Texaco discharged the burden of showing due diligence? These facts were considered by the Court:

- (1) The dike obviously had holes from which oil could escape;
- (2) The cold weather, though coming early, and the paving of the parking area created a situation which called for vigilance;
- (3) The opinion of Mr. Rohrer that "anything man made is subject to failure. The most carefully constructed piece of equipment or facility is subject to disability at one time or another - dikes not excluded."
- (4) The statement of Mr. Currie that in mid-morning of December 14th he checked the diked areas and saw nothing which would cause an oil spill in the harbour. This check was made after a telephone call from the agent for Petro Fina, that company having been considered as a possible source of the spill. Again between 2.30 and 3 he examined the drains in the dike and saw, as he said, nothing out of the ordinary in the dikes.

Countering each of these points would be this evidence:

- (1) The dike in which the three holes were located was the old dike wall, and another wall had been built inside it;
- (2) There was always cold weather at some time during the winter, and there had been no break in the system leading to large losses of oil before that day;
- (3) The opinion of Mr. Rohrer that he "would expect the dike walls to retain a massive spill". and that he didn't "think I would expect a leak at the particular point." He answered "No" to the question as to whether there was any part of the inspection procedure that would have detected a break of this nature before it occurred.
- (4) The evidence of Mr. Pierce, supported by that of Thomas Leung of the Nova Scotia Department of the Environment, was that there was a considerable quantity of oil in the diked area.

I must now consider whether Texaco did exercise due diligence. I am driven to the conclusion that the inspection procedure was not satisfactory. I make this a finding - in other words, there wasn't due diligence.

But one other question remains. Granted, as I have found, that there was fault in Texaco's inspection procedure, what effect is there in the fact that the open ditch led to an unknown sewer into Halifax Harbour?

I am of the opinion that the company is responsible, once it fails in the defence of due diligence, for a natural result of its fault. The natural result of an escape of oil may be unpredictable and unforeseen, but certain physical laws will be followed - the most important being that a liquid will seek lower levels.

The company has argued the unforeseeability of the result of the leakage. Indeed if the oil had remained in that ditch and had for example, prevented the movement of freight cars along the railway tracks or either side for several days, different law would have applied. That is to say, the action would probably be at common law and certainly s. 33 (8) would not be in issue.

The key words in that section are:

unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

What happened here, of course, was accidental - only a mad man would intend an oil spill or leakage. And, of course, Texaco people would not consent to the deposit of oil in the ground from whence it could enter the harbour. But as Mr. Justice Morrow said in the *Tungsten* case, previously noted,

To avoid liability the appellant must couple lack of consent with a behaviour or consciousness which in effect shows it was not blind to the consequences of the possibility as well as the consequent danger of a leakage such as is found in the present case.

Accordingly I convict. In assessing the penalty, I consider that the company acted properly in trying to minimize the effects of the leakage, and I take into account the considerable amount of money spent on the safeguarding of the bulk storage plant, and on the clean-up. I must also consider the rather large amount of the leakage. It seems to me that a penalty in the lower range is appropriate, and I fix this at \$2,000.00 payable by June 29, 1979.

Dated at Halifax, N.S., this 31st day of May A.D., 1979.

RE FOREST PROTECTION LIMITED AND GUERIN

Supreme Court of New Brunswick - Appeal Division, Hughes, C.J.N.B., Bugold and Ryan, J.J.A., Fredericton, May 25, 1979

Constitutional law -- Fisheries Act -- Pest Control Products Act -- Certiorari -- Prohibition -- Crown Corporation.

Appeal from the judgment of Stratton, J. Supreme Court of N.B.- Queen's Bench Division, reported at p. 139 in this volume and (1978), 7 CELR 93.

The accused, Forest Protection Limited, a provincial crown corporation, applied for certiorari and prohibition to stop proceedings under subsection 33(2) of the *Fisheries Act* and subsection 3(1) of the *Pest Control Products Act* and, subsection 44(1) of the *Pest Control Products Regulations*. The informations were laid by Mrs. Guerin, the President of the Concerned Parents Group Inc.

Held, the application of the accused for orders of certiorari and prohibition with respect to the summons and informations laid under the *Fisheries Act* was refused. The Crown is liable to prosecution under section 71 of the *Fisheries Act*. No similar provision is contained in the *Pest Control Products Act*, and therefore, the Crown is not liable to prosecution under that Act. Prohibition was granted with respect to prosecutions under the *Pest Control Products Act* and the *Regulations*.

Hughes, C.J.N.B.: -- This is an appeal by Forest Protection Limited (herein referred to as "F.P.L.") from the judgment or order of Mr. Justice Stratton, dismissing with costs three applications by F.P.L. for orders of certiorari to remove into the Supreme Court and to quash thirty summonses issued by a number of Judges of the Provincial Court of New Brunswick to F.P.L. pursuant to informations laid by the respondent Lucretia J. Guerin, President of The Concerned Parents Group Inc. (herein referred to as "Mrs. Guerin"), and for orders of prohibition to prohibit any Judge of the Provincial Court of New Brunswick from taking any further proceedings with respect to the above referred to informations and summonses.

On March 14, 1977, Judge Taylor, a Judge of the Provincial court, pursuant to informations laid by Mrs. Guerin issued five summonses in which it was alleged that F.P.L. on or after May 20, 1975, and on May 26, 1976, and on three occasions on May 28, 1976, committed breaches of s. 33(2) of the *Fisheries Act*, R.S.C. 1970, Chap F-14 and amendments thereto, which reads:

33(2) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

On the same date Judge Taylor issued two other summonses on informations laid by Mrs. Guerin in which it was alleged that F.P.L. did, on May 28th, 1976, May 21, 1976 and May 26, 1976, breach the provisions of s.3(1) of the *Pest Control Products Act*, R.S.C. 1970, Chap P-10 which reads:

3(1) No person shall manufacture, store, display, distribute or use any controlled product under unsafe conditions.

Furthermore, on the same day, Judge Taylor issued three other summonses upon informations laid by the same informant, alleging that F.P.L., on two occasions on May 26, 1976 and on May 21, 1976 and May 28, 1976, breached s.44(1) of Regulation S.O.R.-72-451 of the Pest Control Products Regulations dated November 10, 1972 issued and authorized pursuant to the Pest Control Products Act. The subsection reads:

44.(1) No person shall use a control product in a manner that is inconsistent with the directions or limitations respecting its use shown on the label.

After the ten summonses hereinabove referred to had been served upon F.P.L., its counsel made application to Mr. Justice Stratton for an order of certiorari to remove and quash the ten summonses and for an order of prohibition to prohibit the Provincial Court or any Judge thereof from taking further proceedings with respect to the said summonses and/or informations. Upon this application, Mr. Justice Stratton made an order dated April 6, 1977, under O. 62 of the rules of the Supreme Court for the issue of a summons returnable before himself.

On May 16, 1977, Judge Gilbert, a Judge of the Provincial Court, upon an information laid by the respondent, issued a summons in which it was alleged that F.P.L. committed breaches of s.3(1) of the Pest Control Products Act on May 22, and on May 24, 1976.

On May 17, 1977, Judge Montgomery, also a Judge of the Provincial Court, issued two summonses upon informations laid by the respondent charging F.P.L. with offences under s.3(1) of the Pest Control Products Act on May 21 and May 26, 1976, and one offence against s.33(2) of the *Fisheries Act* alleged to have occurred on May 26, 1976.

On May 18, 1977, Judge Savage, a Judge of the Provincial Court, upon informations laid by Mrs. Guerin, issued eight summonses charging F.P.L. with offences against s.33(2) of the *Fisheries Act*, and s.3(1) of the Pest Control Products Act, alleging the offences to have occurred on May 20, 21, 24, 26 and 31, 1976.

On May 20, 1977, Judge Taylor, upon informations laid by Mrs. Guerin, issued a further eight summonses charging F.P.L. with offences against s.33(2) of the *Fisheries Act*, s.3(1) of the Pest Control Products Act and s.44(1) of the Regulations made thereunder, and alleging the offences occurred on June 1, 2 and 3, 1976, and May 12, 1977.

A similar application to Mr. Justice Stratton was made by counsel on behalf of F.P.L. for orders of certiorari and/or prohibition with respect to the last mentioned group of nineteen summonses, and an order thereon was made on May 26, 1977 returnable before the same Judge.

Finally, on May 24, 1977 Judge Gilbert issued one further summons upon the information of Mrs. Guerin charging F.P.L. with offences under s.3(1) of the Pest Control Products Act on May 25, and 30, 1976, and on June 9, 1977, Mr. Justice

Stratton issued a third summons for the hearing of an application for orders of certiorari and prohibition.

Mr. Justice Stratton conducted the hearing of all three summonses on June 28 and 30, 1977, and following the taking of evidence and the filing of briefs by counsel acting on behalf of F.P.L. and Mrs. Guerin, the learned Judge issued his judgment dated February 17, 1978, whereby he dismissed, with costs, the three applications.

On this appeal, counsel on behalf of F.P.L. alleges that the learned Judge erred in refusing to issue the orders of certiorari and/or prohibition asked for on one or both of the following grounds:

a) Forest Protection Limited is and has been at all times a servant of the Crown in Right of the Province of New Brunswick and in particular during the months of May and June in the years 1975 and 1976, and as such it is not subject to proceedings under and by virtue of the Criminal Code, R.S.C. 1953-54, C. 51, and amendments thereto, and it is immune to prosecution under the Fisheries Act, R.S.C. 1970, Chap F-14, and amendments thereto, and the Pest Control Products Act, R.S.C. 1970, Chap P-10, and amendments thereto, and the Judges of the Provincial Court referred to herein therefore exceeded their jurisdiction in issuing the within summonses and are without jurisdiction to conduct any further proceedings in relation thereto;

b) The laying of thirty separate informations by the same informant against Forest Protection Limited under the same Acts in the circumstances amounts to an abuse of the process of the Court in that the informant and the Concerned Parents Group, Inc., which she represents, are endeavouring to use the criminal courts to achieve a civil and/or political object and as such, should not be tolerated.

In his reasons for judgment, the learned Judge of first instance related the factual background of the instant case. Needless to say, the so-called spray program constitutes an extremely contentious issue due to conflicting concerns between those who believe the spray is necessary for the survival of the spruce and fir forests of the Province, and the economy based thereon, and those who are concerned over the effect of the spray upon the environment. As to the factual background, I can do no better in describing the situation than to quote certain portions of the reasons for judgment of the learned Judge of first instance in which he stated:

The forests of New Brunswick have become infested with the spruce budworm, an insidious insect which defoliates and kills fir and spruce trees. In the spring of 1952, New Brunswick International Paper Company Ltd. and the Government of the Province of New Brunswick jointly carried out an experimental aerial spraying program over a limited area of forest to determine its effect upon the spruce budworm, it was successful. Subsequently, representatives of Government and the forest industry met and decided to incorporate a private company to undertake the organization and management of a program of aerial spraying of insecticide to protect the forests of New Brunswick.

F.P.L. was then organized; it was incorporated by Letters Patent dated September 6, 1952; it has as its sole object and purpose the protection of the forests. F.P.L. is a standard private trading corporation with a capital stock of \$5,000.00 divided into 500 common shares of the per value of \$100.00 each. Two hundred shares have been issued; in 1975, 180 of the issued shares were registered in the name of Her Majesty the Queen and in 1976, this increased to 182 shares. At the present time, of the remaining 18 issued shares, 17 are held by nine participating pulp and paper companies and one share is registered in the name of F.P.L.

Formerly, each of the nine pulp and paper companies had two representatives on the Board of Directors of F.P.L.; currently, there are 22 directors but only 9 of these now represent the pulp and paper companies; the balance are either Ministers of the Provincial Crown or representatives of Provincial Government Departments, principally the Department of Natural Resources. The president of F.P.L. is the Deputy Minister of Natural Resources; its chairman and secretary are employed and paid by the latter department. Other officers and employees of F.P.L. during the years 1975 and 1976 included employees of private industry paid by the individual companies from which they came, employees of the Government of New Brunswick paid by the Government as well as employees paid by F.P.L.

F.P.L. has, since 1952, (except for 1959), carried out an annual spray program in May and June of each year. The "Spray Program" for each year results from a number of contributing facts and factors; in the preceeding fall, the area to be sprayed is first determined by defoliation and budworm eggmass surveys conducted by Government agencies; as the result of these surveys, a proposed spray map is prepared depicting the areas of the Province to be sprayed, regardless of ownership; the insecticide to be used is selected and the number of its applications and its dosage is determined. This spray program is then submitted to the Federal Department of Agriculture which receives advice on the program from experts in related fields employed by the various departments of the Federal and Provincial Governments who form an Interdisciplinary Committee. The approval of the Federal Department of Agriculture is received each year before the spray program is put into effect. The spray program is also presented to the Board of Directors of F.P.L.; the approval of the Board is contingent upon the approval of the Deputy Minister of Natural Resources who receives his authorization from the Minister of Natural Resources.

The participating pulp and paper companies contribute one-third of the costs of the annual spray program and the Province contributes two-thirds, although the Province recovers one-half of its contribution from the Federal Government. F.P.L. makes no profit nor does it incur any loss. Its expenditures are merely met by the participating companies and the Province in the proportions indicated.

Section 3 of the Forest Service Act, R.S.N.B. 1973, c.F-23, (formerly R.S.N.B. 1952, c.93, s.3) is here relevant; it provides as follows:

3(1) The Lieutenant-Governor in Council shall maintain a forest service for the purpose of

(a) protecting the forests from fire, insects and diseases, ...

3(2) Subject to the approval of the Lieutenant-Governor in Council, the Minister may enter into agreements with the Government of Canada or with any person to undertake and carry out operations for protecting the forests from fire, insects, and disease; and the Minister may delegate to such party such authority as may be deemed necessary for the effectual carrying out of the agreement.

Section 3(2) was cited by the Province as authority to pass Order-in-Council No. 53-376, dated May 7, 1953, which authorized the Minister of Lands and Mines, (now Natural Resources), to execute an agreement with F.P.L. by the terms of which the Provincial Government engaged F.P.L. to undertake and manage an aerial spraying operation directed against the spruce budworm, infestation of the forests in the northern part of New Brunswick and undertook to pay two-thirds of the amount of the expenditures of the aerial spraying operation. From 1953 to 1975 this agreement was continued from year to year and the annual estimated cost of the Government's share of the program was included in the estimates for the Department of Natural Resources and approved by the Legislature of the Province of New Brunswick.

The spray programs for the years 1975 and 1976 were submitted to the Federal Department of Agriculture and approved. They were also approved by the Board of Directors of F.P.L. which engaged private contractors to provide the planes and pilots to carry out the aerial spraying operations; these latter contractors were engaged by an agreement providing for the approval of the Government of New Brunswick. The Main Estimates for the Department of Natural Resources for the fiscal years commencing April 1, 1975 and April 1, 1976, together included sums exceeding \$10,000,000.00 for forest insect control which were approved by the New Brunswick Legislature and actually paid by the Department of F.P.L. for the programs which were carried out.

Because of the decision of Mr. Justice Stevenson in Bridges Brothers Ltd. v. Forest Protection Ltd. (1976) 14 N.B.R. (2d) 91, the Board of Directors of F.P.L. sought and obtained from the Provincial Government an Order-in-Council and Letter Agreement. The Order-in-Council is numbered No. 76-335 and is dated May 12, 1976; it provides as follows:

1. Pursuant to section 3 of the Forest Service Act, the Lieutenant-Governor in Council gives his approval

(a) for the aerial spraying for spruce budworm control in 1976;

(b) for the proposed aerial spray program of approximately 9.6 million acres; and

- (c) for the Minister of Natural Resources to enter into an agreement with Forest Protection Limited to carry out the proposed spraying operations.
- 2. The Province agrees to indemnify Forest Protection Limited with respect to claims for damages for injury to the health of any person directly caused by the application of chemical insecticides used for killing spruce budworms in the spray program for 1976.
- 3. The Province's agreement to indemnify shall not apply
 - (a) to lands owned or controlled by the sponsors of the spray program;
 - (b) unless the chemical insecticide is mixed in the proper proportions and in accordance with any existing licenses, regulations, instructions or requirements;
 - (c) with respect to the spraying of private lands contrary to any instructions which may be given by the Minister of Natural Resources from time to time;
 - (d) in the event the application of the chemical insecticide is not carried out in a proper manner in accordance with reasonable standards of competence and safety or not to knowingly cause harm to the health of any persons.

The Letter Agreement is upon the letter-head of the Minister of Natural Resources and is as follows:

P.O. Box 6000
Fredericton, N.B.
E3B 5H1
May 17, 1976.

Mr. H.J. Irving
Managing Director
Forest Protection Limited
P.O. Box 1030
Fredericton, N.B.
H3B 3C3

Dear Mr. Irving:

Pursuant to Order-in-Council of the Lieutenant-Governor under May 12, 1976 and numbered 76-335, I hereby authorize Forest Protection Limited to undertake and carry out the proposed 1976 aerial spray program for spruce budworm control of approximately 9.6 million acres of the forests in New Brunswick.

Further, I hereby delegate to Forest Protection Limited, by the power vested in me under the Forest Service Act, whatever authority is necessary for you to effectually carry out the above program.

Please endorse the original and carbon copy of this letter by your authorized representative signifying your consent to this agreement.

(Sgd.) Roland C. Boudreau
ROLAND C. BOUDREAU
MINISTER OF NATURAL RESOURCES

I, H.J. IRVING, President of Forest Protection Limited, hereby accept this agreement on behalf of the Company.

(Sgd.) H.J. Irving
H.J. IRVING
PRESIDENT

F.P.L. did not plead to the summonses issued herein against it and seeks, by these applications, to challenge the jurisdiction of the learned Provincial Court Judges to try it for the offences which are charged.

In explanation of the reference in the reasons for judgment to the case of *Bridges Brothers Ltd. Forest Protection Ltd.* (supra), I should mention that this was an action brought by a company engaged in the blueberry business, which held about 8,000 acres of land in southern New Brunswick, claiming damages for loss of its blueberry crop in the years 1970, 1971 and 1972 caused by the spray program. One of the defences to the action pleaded by F.P.L. was that the spray operations were carried out with the agreement and approval of the Minister of Natural Resources with the object of protecting the forests from insects and disease pursuant to the *Forest Service Act* of the Province, and that the operations were conducted under statutory authority, and consequently the provisions of the *Protection of Persons Acting Under Statute Act* applied. F.P.L. also pleaded that it was an agent of the Crown or a Crown Corporation.

*The learned trial Judge held F.P.L. had failed to adduce evidence to entitle it to the benefit of statutory immunity, there being no evidence to show that the Lieutenant-Governor in Council acted under authority of the Forest Service Act. Furthermore, he held that F.P.L., being a letters patent company, in the absence of a statute conferring immunity upon it, the proper inference was that it was acting on its own behalf even though controlled to some extent by a Government department; citing 9 Halsbury's *Laws of England* (3rd ed.) p. 10; *North and Wartime Housing Ltd. v. Madden*, [1944] 4 D.L.R. 161; and *Logan v. Board of School Trustees, District 14* (1973) 6 N.B.R. (2d) 599. The learned Judge concluded that F.P.L. was an independent contractor of the Crown and of the eight participating pulp and paper companies, and was an "agent" within the definition of that word in the *Proceedings Against the Crown Act*, R.S.B.N. 1973, Chap P-18, which includes "an independent contractor engaged by the Crown".*

The offences charged

F.P.L. was charged with a number of offences against subsection (2) of section 33 of the *Fisheries Act* as amended. It was submitted, during the course of the hearing, that the following provisions of the Act are relevant to the issues to be decided:

33(2) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

33(5) Any person who violates any provision of this section is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars for each offence.

64. Any proceedings by way of summary conviction in respect of an offence under this Act may be instituted at any time within two years after the time when the subject matter of the proceedings arose.

71. This Act is binding on Her Majesty in Right of Canada or a Province and any agent thereof.

F.P.L. was also charged with a number of offences against s.3(1) of the Pest Control Products Act, R.S.C. 1970 Chap P-10 and against s.44(1) of a Regulation made thereunder. Section 3(1) of the Act reads:

3(1) No person shall manufacture, store, display, distribute or use any control product under unsafe conditions.

Section 44.(1) of the Regulation reads:

44(1) No person shall use a control product in a manner that is inconsistent with the directions or limitations respecting its use shown on the label.

Section 10 of the Act reads in part:

10(1) Every person who, or whose employee or agent, violates any provisions of this Act or the regulations is guilty of

- (a) an indictable offence and is liable to imprisonment for two years, or*
- (b) an offence punishable on summary conviction.*

The Interpretation Act, R.S.C. 1970, Chap I-23 contains the following relevant provisions:

2(1) "enactment" means an Act or a regulation or any portion of an Act or regulation;

16. No enactment is binding on Her Majesty or affects Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to.

27(2)... all the provision of the Criminal Code relating to summary conviction offences apply to all other offences created by an enactment except to the extent that the enactment otherwise provides.

Counsel for F.P.L., in supporting his application for orders of certiorari and prohibition, contends that F.P.L. is immune from prosecution for the offences alleged in all thirty of the informations on the ground that at all times material to the alleged offences F.P.L. was a servant of the Crown in right of the Province of New Brunswick.

The learned trial Judge rejected this contention after reviewing a number of cases where Crown immunity was claimed. These included Mellenger v. New Brunswick Development Corporation [1971] 2 A11 E.R. 593, where the English Court of Appeal held the defendant immune from suit in England on the ground the defendant was an arm of the Government of New Brunswick and could avail itself of the doctrine of sovereign immunity. There the plaintiff's action was for a commission alleged to be due and owing to him by the Development Corporation. The defendant in that case was constituted by a special Act of the Legislature of New Brunswick which provided:

There is hereby constituted on behalf of Her Majesty in Right of New Brunswick a body corporate under the name of The New Brunswick Development Corporation.

Lord Denning, at p. 596, stated the legislation constituted the corporation "on behalf of Her Majesty" which, in the circumstances, was sufficient to entitle the corporation to sovereign immunity, but he continued:

Apart, however, from the statute, the functions of the corporation, as carried out in practice, show that it is carrying out the policy of the Government of New Brunswick itself. It is its alter ego.

Counsel for F.P.L. submitted that the latter statement indicated that even though F.P.L. is not a statutory corporation, it might still be a servant of the Crown because of its functions and purpose.

The second case relied upon by the learned trial Judge was that of Westeel-Rosco Limited v. Board of Governors of South Saskatchewan Hospital Centre et al. [1977] 2 S.C.R. 238 (S.C.C.), where the defendant hospital board contended it was an agent of the Crown and as such was not subject to the Saskatchewan Mechanics' Lien Act. There is no resemblance between the facts in the Westeel-Rosco case and the instant case, but Mr. Justice Ritchie, in delivering the judgment of the Supreme Court, stated the applicable rule involved in the issue which we have to decide on this appeal. At pp. 249-50 he stated:

Whether or not a particular body is an agent of the Crown depends upon the nature and degree of control which the Crown depends upon the nature and degree of control which the Crown exercises over it. This is made plain in

a paragraph in the reasons for judgment of Mr. Justice Laidlaw, speaking on behalf of the Court of Appeal for Ontario in *R. v. Ontario Labour Relations Board, Ex. p. Ontario Food Terminal Board*, (1953), 38 D.L.R. (2d), 530, at. 534, where he said:

It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with certainty whether or not an entity is a Crown agent. The answer to that question depends in part upon the nature of the functions performed and for whose benefit the service is rendered. It depends in part upon the nature and extent of the powers entrusted to it. It depends mainly upon the nature and degree of control exercisable or retained by the Crown.

The learned Judge of first instance also relied on a passage in Halsbury's Laws of England, 4th ed. vol. 9 at p. 722 which reads:

In the absence of any express statutory provision, the proper inference, at any rate in the case of a commercial corporation, is that it acts on its own behalf, even though it is controlled to some extent by a government department. The fact that a minister of the Crown appoints the members of such a corporation, is entitled to require them to give him information and is entitled to give them directions of a general nature does not make the corporation his agent. The inference that a corporation acts on behalf of the crown is more readily drawn where its functions are not commercial but are connected with matters, such as the defence of the realm, which are essentially the province of government.

Counsel for both parties to this appeal have submitted a number of other authorities on the issue of what is, and what is not, a servant of the Crown, but I find nothing in the material submitted nor as a result of my own research on the question which assists me in reaching a firm opinion on the question. I shall therefore seek to apply the test stated in the judgment in the *Westeel-Rosco* case, and consider in particular the nature and degree of control which the Crown, in right of the Province of New Brunswick, exercised over F.P.L. during the spray program seasons in 1976 and 1977 when the alleged offences were said to have been committed. I note, first of all, that s. 3(1) of the Forest Service Act provides:

3.(1) The Lieutenant-Governor in Council shall maintain a forest service for the purpose of

(a) protecting the forests from fire, insects and diseases, ...

I infer that this responsibility of the Lieutenant-Governor in Council could be discharged by the employment of persons having the status of employees within a department or branch of the Government. It could be performed through the employment of an independent contractor, or through a company owned and controlled by the Crown in right of the Province.

In *Montreal v. Montreal Locomotive Works Ltd.* [1947] 1 D.L.R. 161 (P.C.), affirming [1945] S.C.R. 621, it was held that a commercial corporation which normally carried on its own business, may by contract, act as a servant or agent of Her Majesty

by contracting to act on business of Her Majesty under the control of Her Majesty through her Minister and on her behalf. In the contracts between the corporation and the Canadian Government represented by the Minister of Munitions and Supply of Canada for the production of tanks and gun carriages, the corporation's obligations were referred to as "for and on behalf of the Government and as its agent". It was held that on the proper construction of the contracts where the corporation took no risk of loss and assumed no liability except for bad faith or wanton neglect, and the fees it received from the Government were for management services, the corporation was an agent of the Crown rather than an independent contractor. Hence, the corporation was held not assessable for occupant or business taxes under the Montreal Charter. Lord Wright, after referring to the problem of whether the corporation was an agent of the Government or whether it was acting on its own behalf in making the tanks and gun carriages for delivery to the Government stated at p. 169:

The great difference of opinion on this question in the Courts below illustrates the difficulty which is inherent in deciding questions like this. In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive.

In the case at bar, F.P.L. does not carry on any business with a view to profit, nor is there any risk of loss. The company is used by the Government of New Brunswick as its instrument to perform the budworm spray program and to all intents and purposes, the company and the work which it performs, is totally controlled by officials designated or appointed by the Government or its officials. The spray program, which is carried out, is first approved by the Government which has power at any time to alter the program in any respect and to specify how, when and with what kind of insecticide the program is to be implemented. The degree of control which the Government has over the activities of F.P.L. is, in my opinion, as complete and detailed as the control which it could exercise over its own employees had the Government chosen to perform the spray operations with its own forces, and chartered air craft and pilots to carry out the spraying operations. Having given the question my best consideration, I have reached the conclusion that F.P.L. in the conduct of the spruce budworm program is a servant of the Government of New Brunswick and as such is entitled to such immunity from prosecution as the Crown in the Right of the Province possesses with respect to the offences specified in the Acts and Regulations under which the charges against F.P.L. have been laid. In reaching this conclusion, I have taken into consideration two decisions of this Court involving the quasi-criminal liability of employees of the Crown or of a Crown agency. In The King v. Marsh: Ex parte Walker (1909) 39 N.B.R. 329, where a station agent of the Intercolonial Railway at Fredericton was convicted under the Canada Temperance Act of an offence of warehousing and keeping for delivery a quantity of intoxicating liquor brought into the railway station by the Intercolonial Railway, while acting as a servant of the Railway, a public work owned and operated by the Crown in Right of Canada, it was held that the Crown, not being expressly mentioned in the Canada Temperance Act, was not bound thereby and therefore its station agent, acting in the course of his duty, could

not be convicted of the offence. In the second case, *The King v. LeBlanc (1930) 1 M.P.R. 21*, where a road supervisor, acting in obedience to his instructions, stored dynamite belonging to the Crown in the right of the Province of New Brunswick contrary to the Explosives Act, R.S.C. 1927, ch. 62, an Act not made binding on the provincial Crown, the conviction of the Crown's servant, acting in the course of his employment which was the construction of a public work to be used and operated for the benefit of the public, was set aside, the servant being held excluded from the provisions of the Explosives Act as was his employer, the Crown.

The question now to be considered is what immunity from prosecution does the Crown in Right of the Province of New Brunswick possess in respect of prosecutions (a) for offences against the *Fisheries Act*, and (b) for offences against the *Pest Control Products Act* and regulations made thereunder?

I have already set forth the text of s.33(2) and s.33(5) of the *Fisheries Act* which create the offences with which F.P.L. is charged. Section 71 of the Act reads:

71. This Act is binding on Her Majesty in Right of Canada or a Province and any agent thereof.

In my opinion, no other objective can be attributed to s. 71 than that Parliament intended to make the prohibitions contained in the Act applicable to the Crown both in the Right of Canada and the Provinces and any agent thereof. This interpretation would, of course, include F.P.L. as an agent of the Crown.

The *Pest Control Products Act* and Regulations made thereunder are not made applicable to the Crown either in the Right of Canada or of a Province. Accordingly, I am of the opinion that the Crown in the Right of the Province of New Brunswick is not bound thereby, and that F.P.L., which I found to be a servant of the Crown, is also not bound by the Act when it acts in the course of its employment and within the scope of its authority as a servant of the Crown.

As a second ground for the application by counsel for F.P.L. for orders of certiorari and prohibition, counsel advanced the argument that the laying of thirty separate informations by the same informant, against F.P.L. under the same Acts, constituted an abuse of the process of the Courts in that the informant and the Concerned Parents Group Inc. are endeavouring to use the criminal Courts to advance a civil and/or political object, and that such should not be tolerated.

The learned Judge of first instance rejected this submission on the authority of *Rourke v. The Queen (1977) 16 N.R. 181; 35 C.C.C. (2d) 129*, wherein Mr. Justice Pigeon stated:

I cannot admit of any general discretionary power in Courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive.

Counsel submitted a number of decisions referring to the Rourke case including *Re Orysiuk and The Queen (1977) 37 C.C.C. (2d) 445 (Alta C.A.)*, and *R. v. Weightman and Cunningham (1977) 37 C.C.C. (2d) 303*, to support his contention that

the rule relied upon by the learned Judge of first instance did not apply to the facts of the instant case.

I find no admissible evidence in the material presented in the instant case to establish an ulterior or improper motive for the laying of the informations, all evidence relied upon being hearsay and contained in newspapers. It is therefore unnecessary, in these proceedings, to determine whether this is a proper case for the Court's intervention to prohibit a prosecution.

For the foregoing reasons I would allow the appeal in part, and order that the Judges of the Provincial Court of New Brunswick be prohibited and they are hereby prohibited from further proceeding in the matter of the informations laid by the respondent against Forest Protection Limited for alleged offences hereinabove referred to against the Pest Control Products Act and the Regulations made thereunder.

The application of Forest Protection Limited for orders of certiorari and prohibition with respect to informations laid under the *Fisheries Act* and the summonses issued thereon is refused.

As the appeal is allowed in part, I would make no order as to the costs.

REGINA v. BLACKHAM'S CONSTRUCTION LTD

British Columbia County Court, Chilliwack, Grimmatt, J., December 27, 1979

Constitutional Law - Fisheries Act - R.S.C. 1970, chap. F-14, as amended by ss. 31(1) S.C. 1976-77, chap. 35 -- harmful, alteration, disruption or destruction of fish habitat --British Columbia Gravel Removal Order, SOR/76-698, under Fisheries Act -- property ownership.

The accused corporation was charged with removing gravel from the Fraser River without a permit from the fisheries authorities and carrying on an undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat. The provincial Court acquitted the accused.

Held, the appeal by the Crown was dismissed. The *Fisheries Act* cannot, in effect, prohibit the accused from carrying on its business of gravel removal from property over which it has exclusive rights of ownerships.

D. Renwick, for the Crown, appellant

J. Cram, for the accused, respondent

Grimmett, Co. Ct. J.:--- This is an appeal from an acquittal by the Provincial Court of the Respondent on four counts that it did at or near Clark Road, in the Municipality of Chilliwack, Province of British Columbia:

1. *...on or about the 21st day of November, A.D. 1978 ... unlawfully did remove gravel from the normal high water wetted perimeter of the Fraser River that is a spawning ground frequented by fish without being the holder of a permit in writing issued by the Regional Director or a fishery officer.*
2. *...on or about the 21st day of November, A.D. 1978 ... did unlawfully carry on an undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat.*
3. *...on or about the 23rd day of November A.D. 1978 ... unlawfully did remove gravel from the normal high water wetted perimeter of the Fraser River that is a spawning ground frequented by fish without being the holder of a permit in writing issued by the Regional Director or a fishery officer.*
4. *...on or about the 23rd day of November, A.D. 1978 ... did unlawfully carry on an undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat.*

Counts 2 and 4 are laid under Section 31(1) of the Fisheries Act R.S.C. 1970 Chapter F-14 and Counts 1 and 3 are laid under the British Columbia Gravel Removal Order SOR/76-698 passed pursuant to the said *Fisheries Act* and the sections of the Act and the Gravel Removal Order as follows:

FISHERIES ACT

Section 31(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

Section 31(5) For the purposes of this section and sections 33, 31.1 and 33.2, 'fish habitat' means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.

BRITISH COLUMBIA GRAVEL REMOVAL ORDER

2. No person shall remove gravel from, or displace gravel within, the normal high water wetted perimeter of any portion of a stream, river or other body of water that is a spawning ground frequented by fish otherwise than under the authority of and in accordance with a permit in writing issued by the Regional Director or a fishery officer.

4. A permit issued under Section 2 or 3 shall not be constructed as permitting a person

- (a) to alter the configuration of a river, stream or body of water without permission from the provincial authority having jurisdiction in the matter; or*
- (b) to remove gravel from or displace gravel within a place unless he is the owner of that place or acts on behalf of such owner.*

are: The facts relating to the case are not in dispute, and the material facts

- 1. The area involved is either owned by, or that portion not owned is leased, by the Respondent.*
- 2. Both parts, either owned or under lease, were alienated from the Crown by Crown grants late in the last century, and are held in fee simple by the Respondent or its lessor as ultimate successor in title from the original Crown grantees.*
- 3. All of the area involved was originally dry land but subsequent to the Crown grants, according to the surveyor witness, Tunbridge, in the 1930's or 1940's, the Fraser River changed and a channel of the river became established, still exists, and it is from part of this area of the river that the Respondent is in the business of gravel.*
- 4. The area from which the Respondent is removing gravel is a "fishing habitat" as described in the Fisheries Act.*

Counsel for the Respondent candidly agrees that the Government of Canada has the legislative authority to enact legislation for the regulation and preservation of fisheries, but relies on the fact that the property is owned in fee simple or leased by it from an owner in fee simple and that it is entitled to carry on

the said gravel removal business in spite of Section 31 of the *Fisheries Act* and Section 2 of the British Columbia Gravel Removal Order.

In effect, the case turns on the question of whether the Federal Government with its power to enact legislation for the regulation and preservation of fisheries, can by such legislation, deprive an owner of land in fee simple without any reservations to the right to use that land in a manner that would, except for the federal *Fisheries act* legislation, be lawful.

Several cases were cited by counsel as follows:

1. *R. v. Fowler* [1977] 4 W.W.R. 449
2. *R. v. Fowler* [1979] 1 W.W.R. 285
3. *R. v. McTaggard* 1972 3 W.W.R. 30
4. *Attorney General for Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia* [1898] A.C. 700
5. *Attorney-General for Canada v. Attorney General for British Columbia* [1920] 3 W.W.R. 449
6. *The Queen v. Christian A. Robertson* [1882] 6 S.C.R. 52
7. *Venning v. Steadman* [1883] 9 S.C.R. 206
8. *Attorney General for British Columbia v. Attorney General for Canada*, [1914] A.C. 153.

I feel that it is only necessary to consider three of the cases cited, namely, *The Crown v. Robertson*, *Venning v. Steadman*, and *A.G. for Canada v. A.G.'s for Ontario, Quebec and Nova Scotia* and I shall quote from what I believe to be the applicable portions of the said cases:

The Queen v. Robertson

Headnotes, Page 53:

HELD - (affirming the judgment of the Exchequer Court) 1st, that the general power of regulating and protecting the Fisheries, under the British North America Act, 1867, sec 91, is in the Parliament of Canada, but that the license granted by the Minister of Marine and Fisheries of the locus in quo was void because said act only authorizes the granting of leases 'where the exclusive right of fishing does not already exist by law,' and in this case the exclusive right of fishing belonged to the owners of the land through which that portion of the Miramichi River flows.

Pages 63-64:

'The clause of the Act referred to in the first of the above questions is the 2nd section of the Dominion Act 31st Vic., ch. 60, and is as follows:-- 'The Minister of Marine and Fisheries may, where the exclusive right of fishing does not already exist by law, issue or authorize to be issued Fishery Leases, and licenses for Fisheries and fishing wherever situate and carried on, but leases or licenses for any term exceeding nine years, shall be issued only under authority of an order of the Governor in Council'.

'The Act in which this section is contained was passed by the Dominion Parliament' for the regulation of fishing and the Protection of Fisheries and it was passed under the authority of the British North America Act, the 91st section of which places, among other matters, under the exclusive authority of the Parliament of Canada, 'Sea Coast and Inland Fisheries'.

Pages 123 and 124: (Ritchie, C.J.)

To all general laws passed by the Dominion of Canada regulating 'sea coast and inland fisheries' all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large. Therefore, while the local legislatures have no right to pass any laws interfering with the regulation and protection of the fisheries, as they might have passed before confederation, they, in my opinion, clearly have a right to pass any laws affecting the property in those fisheries, or the transfer or transmission of such property under the power conferred on them to deal with property and civil rights in the province, inasmuch as such laws need have no connection or interference with the right of the dominion parliament to deal with the regulation and protection of the fisheries, a matter wholly separate and distinct from the property of the fisheries. By which means the general jurisdiction over the fisheries is secured to the parliament of the Dominion, whereby they are enabled to pass all laws necessary for their preservation and protection, this being the only matter of general public interest in which the whole Dominion is interested in connection with river fisheries in fresh water, non-tidal rivers or streams, such as that now being considered, while at the same time exclusive jurisdiction over property and civil rights in such fisheries is preserved to the provincial legislatures, thus satisfactorily, to my mind, reconciling the powers of both legislatures without infringing on either.

Venning v. Steadman

Headnotes, Page 206 and 207:

Three several actions for trespass and assault were brought by A., B., and C., respectively, riparian proprietors of land fronting on rivers above the ebb and flow of the tide, against V. for forcibly seizing and taking away their fishing rods and lines, while they were engaged in fly-fishing for

salmon in front of their respective lots. The defendant was a Fishery Officer, appointed under the Fisheries Act (31 Vic. ch. 60), and justified the seizure on the ground that the plaintiffs were fishing without licenses in violation of an Order-in-Council of June 11th, 1879, passed in pursuance of section 19 of the Act, which order was in the words:--'Fishing for salmon in the Dominion of Canada, except under the authority of leases or licenses from the Department of Marine and Fisheries is hereby prohibited.' The defendant was armed and was in company with several others, a sufficient number to have enforced the seizure if resistance has been made. There was no actual injury. A recovered \$3,000, afterwards reduced to \$1,500, damages; B. \$1,200; and C \$1,000.

Held -- That Sections 2 and 19 of the Fisheries Act, and the Order-in-Council of the 11th June, 1879, did not authorize the defendant in his capacity of Inspector of Fisheries, to interfere with A., B., and C.'s exclusive right as riparian proprietors of fishing at the locus in quo; but that the damages were in all the cases excessive, and therefore new trials should be granted.

Page 209:

Section 2 provides that:

The Minister of Marine and Fisheries may, when the exclusive right of fishing does not already exist by law, issue or authorize to be issued fishery leases and licenses for fisheries and fishing wheresoever situate or carried on; but leases or licenses for any term exceeding nine years shall be issued only under the authority of an order of the Governor in Council.

Page 209:

Under this statute, on the 11th June, 1879, the Governor in Council passed an Order in Council, which was as follows:

On the recommendation of the Honourable the Minister of Marine and Fisheries, and under the provisions of the 19th section of the Act passed in the session of the Parliament of Canada, held in the 31st year of Her Majesty's reign, ch. 60 and intituled: 'An Act for the Regulation of Fishing and Protection of Fisheries.'

Page 210:

His Excellency, by and with the advice of the Queen's Privy Council of Canada, has been pleased to order, and it is hereby ordered, that the following fishery regulation be, and the same is hereby made and adopted:

'Fishing for Salmon in the Dominion of Canada, except under the authority of leases or licenses from the Department of Marine and Fisheries, is hereby prohibited!'

In construing the 19th section of this statute, I think the authority vested in the Governor of Canada to forbid fishing except under the authority of leases or licenses was intended to apply to cases such as are referred to in the second section, where the exclusive right of fishing does not already exist by law, or to cases where the Government may, as riparian proprietor, have the right as such to control the fishing, and ought not to be held to apply to cases where the exclusive right of fishing exists by law. Such an absolute prohibition of the enjoyment of their property by riparian proprietors, or what might be still worse by granting a license to one proprietor and withholding it from another, thereby destroying the value of the property of the one, and enhancing the value of the property of the other, would simply be an arbitrary interference with the rights of property pure and simple, and no statute should be so construed as to have such an effect, unless, assuming Parliament has the power to enact such a law, it should appear that, possessing such power, such an intention is indicated by clear and unequivocal language or irresistible inference, which it is quite impossible to say exists here, in the face of that well settled canon of construction, that statutes which encroach on the rights of the subjects, whether as regards persons or property, are to receive a strict construction, or as Cockburn, C.J. in *Harrod v. Worship* (1) says:--

'It is a canon of construction of acts of Parliament that the rights of individuals are not interfered with, unless there is an express enactment to that effect, and compensation given them!'

Page 211:

In this case, whether Parliament has the power absolutely to prohibit, or when or under what circumstances riparian proprietors may be prohibited from exercising their rights, it is not necessary to discuss or determine, because, I can find nothing in the statute to justify the conclusion that Parliament intended, for no apparent reason, thus to prohibit the enjoyment of riparian rights, and so directly to interfere with property and civil rights.

Page 226, 227:

...If this be so, what is the jurisdiction here of the defendant? He says:

'Under these statutes and regulations I went there to prevent the party who had the riparian right to fish from fishing on his own land, because he did not take a lease from the Government,'

who had no power to give it to him, or a license where none was required. I have shown he did not require a license, because the law said, as plainly as words could make it, in my opinion, that a party who had an exclusive right did not require a license. Here, then, is one of the rights of property tacitly accorded by the terms of the regulation attempted to be attacked, and if the Government had the right to say, 'You cannot fish on your own land without taking a license,' they could demand a tax so heavy as to prevent the parties using their rights. It is possible that the extreme right

to legislate to that extent does exist, but it could only be exercised where there was an extreme public necessity for it. It is possibly true that extreme course, for the purpose of revenue, might be resorted to by the Government, but then very great necessity must be shown before, I think, Parliament would have the right to say to a riparian owner 'you shall not exercise your common law rights of property without paying a tax to the Government!' It is quite possible that it might be done, and I do not say that in extreme cases it could not be done; but from what we know of the condition of the country, we have no right to conclude that any such necessity exists or existed.

Attorney General for Canada v. Attorneys-General for Ontario, et al

Page 712, 713:

Their Lordships are of opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading, "Sea-Coast and Inland Fisheries" in s. 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected.

The facts and the dicta in the *Venning and Steadman* case are rather compelling in leading me to the conclusion that there should be an acquittal in the case at bar. In that case in spite of an absolute prohibition against fishing for salmon except under lease or license from the Department of Marine and Fisheries it was held that the rights of the riparian proprietors of fishing at the locus in quo could not be interfered with. It of course must be presumed that the prohibition was enacted for "the regulation and protection of Fisheries". So too, and applying this principle, surely the *Fisheries Act* cannot, in the absence of express words, in effect prohibit the Appellant herein from carrying on its business of gravel removal from property over which it has exclusive rights of ownership.

REGINA v. CANADIAN INDUSTRIES LIMITED

New Brunswick Provincial Court, Ayles, J., Campbellton, New Brunswick, March 25, 1980

Environmental law -- Water pollution -- Pollution of waters by mercury -- authority of federal Crown to prosecute in view of Canada - New Brunswick Accord -- Fisheries Act, R.S.C. 1970.

The accused made a motion to dismiss the information containing 14 counts of depositing mercury in excess of the authorized amount. The accused argued that the federal Crown had delegated the responsibility to administer section 33 of the *Fisheries Act* to the Province of New Brunswick and that the federal Crown could not prosecute the accused.

Held, the Canada - New Brunswick Accord for the Protection and Enhancement of Environmental Quality did not prevent the federal Crown from prosecuting the accused. The Province of New Brunswick could have instituted action to lay the charges but they chose not to do so. Under the Accord the federal Crown retained residual right to enforce section 33 of the *Fisheries Act*.

R. Dube, for the federal Crown
R.J. Tingley, for the accused.

Ayles, J.: (orally) -- Very well, gentlemen. On the 26th of February, I heard evidence and arguments relating to Defence Motion to dismiss the Information.

The basis of the objection, was that the information containing 14 charges against the Defendant, C.I.L., was improperly before the Court in that it was not laid by a person properly qualified to bring this information before the Court.

Cases cited by Counsel for the Defendant Company, such as *R. v. Houser*, 8 C.R. (3d) 89, *R. v. Miller*, 30 C.R.N.S. 372. and *R. v. Stevenson*, 26 N.B.R. (2d) 581, clarify who may or may not lay informations - the general principle being as stated in *R. v. Stevenson* by Mr. Justice Barry.

It is a general principle of law that, in the absence of statutory provision, restricting, or regulating, any person may lay an information before the Court by complying with the provisions of the Criminal Code of Canada.

Therefore we start off with the assumption that because the *Fisheries Act*, R.S.C. 1970, Chapter F-14, contains no restriction or regulations - that any person may lay such an information before a Court having jurisdiction which in this case would be the Provincial Court of New Brunswick.

I must note that *Houser* and *Miller*, above, do not change that basic fact. They are concerned with who has the carriage of a particular action and the *Houser* case has definitely settled that in matters involving Federal Statutes, that the Attorney General of Canada has the right to institute and regulate proceedings for a breach of these Statutes. It is agreed, however, that where the Attorney General for Canada does not act or does not interfere, anyone may do so and may prosecute the same.

In this matter the information was instituted by the Attorney General of Canada and conducted to date by his agent, Raymond Dubé.

Up to this point there would be no doubt, whatever, that the information was properly laid. However, the Defence claims that on October 21st, 1975 an Accord was signed between the Government of Canada and the Province of New Brunswick, which was received as exhibit "D-1" attached, entitled; "Canada - New Brunswick Accord for the Protection and Enhancement of an Environmental Quality". Contending that under this Accord the Government of Canada has delegated to the Department of the Environment of New Brunswick the right to administer and to enforce the Regulations with which we are here concerned. Exhibit "D-2", a letter from Environment Canada to the Defendant Company was introduced as being further evidence that there was indeed a delegation of authority to the Province.

It is recognized in this Accord that Canada has jurisdiction and responsibility in a field of environmental quality including pollution prevention.

The crux of the question arises at Article 14 of the Accord and the interpretation of this Article or Paragraph is mainly the point at issue herein.

The Article reads as follows;

14. Canada agrees to take enforcement action:

- (a) at federal facilities unless otherwise agreed to under Clause 13 above;*
- (b) at the request of the Province; or*
- (c) where the Province cannot, or for some reason fails to fulfill its obligations under this Accord, with respect to matters of federal jurisdiction administered by the Province.*

We can agree that Clauses 14 (a) and (b) do not apply after the evidence heard by this Court on February the 26th. Therefore if Canada has delegated its authority, it would have to be done under Section 14 (c).

To paraphrase 14 (c)

Where the Province cannot, or for some reason fails with respect to matters of federal jurisdiction administered by the Province.

It would appear from the Accord "D-1" - the letter "D-2" and the evidence of Mr. Silliphant from the New Brunswick Department of the Environment in Fredericton that the Chlor Alkali Mercury Regulations, which are of federal jurisdiction have been administered by the Provincial Environment Department, on behalf of Environment Canada.

In this case, the Provincial Department of the Environment knew and was made aware of the subject matter of the 14 charges against the C.I.L. and no charges were laid by the Province nor did they intend to institute any charges pursuant to this information which was given both to Environment Canada and to Environment New Brunswick. There was no question that New Brunswick, had it so desired, could have

instituted action to lay the charges presently before the Court by reason of the authority contained in Section 14 of the Accord. They chose not to do so on the advice, apparently, of their legal advisers.

That leaves me with this proposition; to paraphrase 14 (c) again; "Where the Province fails to fulfill its obligations under this Accord".

It seems to me that these words taken alone and also taken in context with the rest of the Article in the Accord are very plain. Looking at the factual situation, the Federal Government was apprised of the fact that the Province would not initiate any charges. Ergo, Environment Canada was left with the knowledge that the Province had failed to fulfill its obligations under this Accord; viz, the obligation to take enforcement action under Article 14 in conformity with the Chlor Alkali Mercury Regulations.

The Federal Government, in the exercise of its residual rights under Section 14 (c) after the Province failed to fulfill its obligations decided to take enforcement action, itself, which I am satisfied it had the full right to do so.

It is my opinion that Canada did not agree to give up any rights of enforcement or prosecution under this Accord. But, in fact, reserved the various items under 14 (a) and (b) and a catchall provision in Article 14 (c) where there may be some disagreement or refusal to act by the Province.

I am also of the opinion that a private individual could lay such an information before this Court and that this Accord would not preclude his so doing and that the Attorney General of New Brunswick would have no authority, whatsoever, to stay proceedings or conduct or control the cause. Unless, he was acting with the permission and under the control of the Attorney General for Canada.

In other words, the Attorney General for Canada is the only one who could interfere in such a case, to conduct the case if he so decided. Otherwise, it would continue to its conclusion.

It is my opinion that the 14 charges were properly laid. That the Attorney General of Canada acting by his agent Phil Henneberry, had authority to lay the said charges and that the Attorney General of Canada is the only party who may conduct, control or in any way deal with the fourteen (14) charges presently before this Court.

Those are my reasons for my decision, gentlemen.

The appeal by the accused to the Court of Appeal of New Brunswick, dismissed on September 9, 1980, is reported at page 304 of this volume.

REGINA v. GULF OF GEORGIA TOWING CO. LTD.

British Columbia Court of Appeal, Bull, Seaton, and Hinksen J.J.A., February 7, 1979

Environmental law -- Pollution -- Charge of depositing oil in water frequented by fish -- Defence of "due diligence" on part of employer -- "Due diligence" not shown -- The Fisheries Act, R.S.C. 1979, c. F-14, s. 33(2) (re-en. R.S.C. 1970 c. 17 (1st Supp.), s. 3), (8) (en. R.S.C. 1970, c. 17 (1st Supp.), s. 3).

Fisheries -- Pollution -- Charge of depositing oil in water frequented by fish -- Defence of "due diligence" on part of employer -- "Due diligence" not shown -- The Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2) (re-en. R.S.C. 1970, c. 17 (1st Supp.), s. 3), (8) (en. R.S.C. 1970, c. 17 (1st Supp.), s. 3).

The accused was charged under s. 33(2) of the *Fisheries Act* that it had deposited oil in water frequented by fish. While the accused was engaged in filling fuel storage tanks a valve at the base of a tank which should have remained closed was open, and oil overflowed.

The accused raised a defence under s. 33(8), which stated that an accused would not be liable if it could show that "he exercised all due diligence to prevent" the commission of the offence. The County Court Judge rejected the defence, finding the accused had not exercised due diligence, and the accused applied for leave to appeal claiming that the judge had erred in law.

Held, leave to appeal was granted and the appeal dismissed. The County Court Judge was right in finding that the accused had not exercised due diligence as it had not created a proper system of ensuring its employees were suitably trained to avoid such spills, and failed to have a back-up system for inevitable human error.

R. v. Sault Ste. Marie (1978), 3 C.R. (3d) 30, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, 21 N.R. 295 considered.

Headnote from 1979 3 W.W.R. 84

P.D. Lowry, for appellant.

D.R. Kier, Q.C., for the Crown.

(Vancouver No. CA 780641) Excerpt from the transcript.

Bull J.A.: Mr. Kier, we will not need to call upon you. My brother Seaton will give the first judgment.

Seaton J.A.: This is an application for leave to appeal on a question of law alone from the decision of a County Court Judge.

The facts that led to this matter were that a fuel barge went to Tahsis Inlet and was unloading fuel. There were four tanks up on shore. Tank 1 was filled through the one pipe that led from where the barge was up to the four tanks. Prior to tank 1 being filled, tank 2 had been filled. Subsequently tanks 3 and 4 were filled, in that order.

When tank 4 was being filled, the oil overflowed from the top of tank 1. The valve at the base of tank 1 was found to be open. During this operation a Mr. Fulmer, who was a seaman on the tug, not skilled in this matter, was on top of the oil tanks at times; at times he was down at the bottom near the valves; and for one period he was away. The other person employed, a Mr. Egget, was the person in charge. He was the operator of the pump on the barge, though it is said that he did come ashore from time to time when they were turning off the valves.

The charge was that the appellant had deposited the oil in water frequented by fish. That charge was laid pursuant to s. 33(2) re-en. R.S.C. 1970, c. 17 (1st Supp.), s. 3 of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended.

The defence at trial before the learned Provincial Judge was that the employees did not deposit the oil. They said it was the act of an intervening party opening the valves. The trial judge accepted that defence and dismissed the charge. The Crown appealed.

On appeal that defence was rejected. There was a further defence raised, which had also been raised before the trial judge but was not considered by him, that being that the accused company was not guilty, notwithstanding that the employees might be, because the company had exercised due diligence. The source of that defence is s. 33(8) en. R.S.C. 1970, c. 17 (1st Supp.), s. 3, which I read:

"(8) In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."

The first defence that I referred to that was rejected by the learned County Court Judge is entirely a question of fact, and so it has not been urged on us. It is said that the learned County Court Judge, in allowing the appeal and convicting the appellant, failed to properly apply s. 33(8), that I have referred to.

The learned County Court Judge made findings of fact as to the cause of this oil spill:

"It is clear on the evidence and the findings of fact by the learned trial Judge that either (a) Mr. Fulmer was in error when he said that the valve in question had been closed by him or his associate, or (b) if he was correct in testifying that the valve in question had been closed, then the valve was subsequently reopened by Fulmer or his associate or a third party."

In my view, the learned County Court Judge concluded that due diligence within the meaning of s. 33(8) had not been shown.

He said this:

"Here the respondent had complete control of the entire operation and had a clear duty to take all reasonable precautions to prevent any spill from occurring. In

view of the obviously immediate and disastrous consequence of carrying on a pumping operation of the kind in question with respect to any one of the four tanks when a connecting valve leading to one of the three other tanks which had already been filled, 'reasonable precautions' must be held to include a close and continual scrutiny of the valves in question throughout the entire pumping procedure or, failing such scrutiny, some other method of ensuring that the valves in question would be closed and remain closed throughout. It is clear that no such continual scrutiny or any adequate alternative precautions were taken. The respondent has not discharged the onus upon it. It is not a defence on the part of the respondent to say that the fault lies with the employee who failed to exercise reasonable care notwithstanding the imposition by the company directors of rigid safety regulations and training programs.

The beginning words of the final sentence I have read, "It is not a defence", have been relied on as a rejection of the defence under s. 33(8) being available, though, in my view, those words do not mean it is not a defence in law. They mean it is not a defence in this case.

The appellant says -- and it cannot be argued -- that it is very careful in its hiring and training practices, and that it ensures that people in the position of Mr. Egget have all the up-to-date safety requirements from the various department. Then, it says, that is enough to meet the onus on us under s. 33(8). I am unable to agree with that. For the purposes of these reasons I assume that Mr. Egget is not the company in respect of s. 33(8), rather that he is an employee or agent, as referred to in that subsection. Whether he is the company or only an employee need not be decided here.

To test the suggested error of law, I would suggest this: that due diligence under the circumstances here might include specific written instructions, maybe locking devices for other valves, possible alarm systems. But in the end I am of the view that the trial judge decided -- and rightly decided -- that this company did not make adequate provisions in its systems or otherwise to prevent a spill caused by a valve being open that should not have been open. I think that the length that the employer must go to will depend on all the circumstances including the magnitude of the damage that will be done in the event of a mistake and the likelihood of there being a mistake. For fuel barges, if one does nothing but hire careful people, train them carefully and tell them not to leave valves open, inevitably a valve will be left open. I am sure they have not hired infallible people. There will inevitably then be a spill. It seems to me that the consequences are so serious that something will have to be devised by the company if it is to be protected here to prevent spills when employees are not as careful as they are told to be.

Counsel for the appellant relied upon a recent decision, and important judgment, in *R. v. Sault Ste. Marie* (1978), 3 C.R. (3d) 30, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, 21 N.R. 295, a decision of the Supreme Court of Canada handed down on 1st May 1978. I must point out at the outset that we have a specific statutory provision. I refer to this case because counsel did and because I think that the common law is now substantially the same as this s. 33(8) provision. This is said at p. 324:

"The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee in the course of employment, the question will be whether the act took place without the

accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system."

If those words were to be applied here, I would think it clear that the appellant had failed. What it must do is create a proper system, and for that it is knowledgeable of what should be done, but I think it quite insufficient to say, "We hire and train carefully." In this case, in my view, due diligence has not been shown. I think that is what the trial judge meant when he said:

"...reasonable precautions' must be held to include a close and continual scrutiny of the valves in question throughout the entire pumping procedure or, failing such scrutiny, some other method of ensuring that the valves in question would be closed and remain closed throughout."

I see no error of law. I would grant leave and dismiss the appeal.

REGINA v. CANADIAN CELLULOSE COMPANY, LIMITED

British Columbia Court Court, Low, C.C.J., Prince Rupert, B.C., July 31, 1979

Environmental law -- Water Pollution -- Deposit of deleterious substance in place under conditions where may enter water frequented by fish -- Defence of due diligence -- Fisheries Act, R.S.C. 1970, c F-14, ss 33(2), 33(8).

The accused corporation appealed its conviction for permitting the deposit of PCB from January 22 to 28, 1977. The crown conceded the appeal with respect to January 28 as it was agreed that the accused exercised due diligence on and after that date.

Held, the appeal by the accused was dismissed with respect to the offence that occurred January 22 to 27, 1977. The County court reduced the sentence to \$1000 per day from \$3,500 per day originally imposed by the Provincial Court. In reducing the offence, the court considered that there were no previous convictions, the explosion of the transformer caused operational difficulties, and the clean up cost was \$200,000.

Werner Hendrich, for the crown, respondent.

Robert Gauder and Irene Stewart, for the accused, appellant.

Low, C.C.J.,--This is a summary conviction appeal from the conviction of the appellant company that contrary to Section 33(2) of the *Fisheries Act*, R.S.C. 1970, c.F14 and c. 17 (1st Supplement) at or near Prince Rupert, British Columbia, on the 22nd day of January, 1977 to the 28th day of January, 1977 it did unlawfully permit deposit of a deleterious substance, to wit: Polychlorinated Biphenyl 1254, in a place under conditions where such deleterious substance may enter water frequented by fish. The chemical particularized is commonly referred to as PCB. It is also referred to as askeral.

Fifteen other counts were included in the information and tried at the same time. Three of them charged the other three offences created by Section 33(2) of the *Fisheries Act* for the same period of time as the count set out above. The other 12 counts charged the same offences on three specific dates subsequent to January 28, 1977. All additional counts were dismissed.

The appellant company owns and operates a pulp mill near Prince Rupert. On top of a building known as Woodroom III an electrical transformer was situated. At approximately 4:00 p.m., on January 22, 1977 the transformer exploded. The explosion discharged approximately 210 gallons of PCB from the transformer to the roof of the woodroom. The woodroom fronts onto Porpoise Harbour, an inlet of the Pacific Ocean. The transformer was located at the back of the woodroom. PCB is an oily substance which is heavier than water and not very soluble in water.

The Crown contended that PCB ran off the roof of the woodroom and into a storm drain system which empties into the harbour. The trial lasted 12 days spread over several months. Many employees of the company were called as Crown witnesses and each side called several experts. The oral judgment covers 104 pages of transcript and consists of an exhaustive review of the evidence and extensive findings of fact.

The Learned Trial Judge found that the charge of permitting the deposit of PCB from January 22 to 28, 1977 in a place under conditions where it may enter water frequented by fish was made out and he convicted accordingly. He applied the Kienapple principle with respect to the other 3 counts particularizing the same time span. He dismissed the other 12 counts because he was not satisfied that the company had deposited or permitted the deposit of the deleterious substance after January 28, 1977.

There was no dispute on appeal of the allegations that PCB is a substance deleterious to fish and that Porpoise Harbour contains water frequented by fish. The basis of the appeal is that the Learned Trial Judge erred in finding that it was the company that committed the offence, in finding that PCB did get to Porpoise Harbour by way of the drainage system, in finding that the Crown's scientific evidence was reliable, and in finding that the appellant did not exercise due diligence to prevent the deposit of the PCB in a place under conditions where it may enter water frequented by fish. In my opinion these are all issues of fact and the findings are not to be disturbed unless they cannot be supported by the evidence. The evidence was carefully and thoroughly sifted in the reasons for judgment and all the findings of fact were amply supported by the evidence. I would go further and say that the evidence was almost overwhelming to support the conclusion that PCB went into the interceptors of the drainage system from whence it made its way to Porpoise Harbour. That situation was permitted by the company to prevail for several days during which time its employees knew or should have known what the likely result would be. It is also my view that the evidence of the experts was properly dealt with and that the water samples from the harbour supported and strengthened the conclusion that PCB did get into the harbour in serious quantities.

The defence of due diligence arises from Section 33(8) of the *Fisheries Act* which reads as follows:

33 (8) In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

It would also arise from the Supreme Court of Canada decision in *Regina v. Sault Ste. Marie* (1978) 3 CR (3d) 30.

Some time was spent at trial on the cause of the explosion and the condition of the transformer prior to the explosion. The Learned Trial Judge reached the conclusion that the transformer needed replacement and that the appellant did not exercise due diligence in attending to it. He also concluded that after the explosion the company did not act reasonably and with the obviously necessary care to prevent the PCB from entering and remaining within the drainage system. I am not sure that it was necessary to make the first finding but both findings are certainly supported by the evidence. Once the explosion took place and the dangerous substance was released the company's duty to contain it was clear. It was not until January 24th that the cleanup of the oil on the ground started and the interceptors in the drainage system were not cleaned out until January 27th. The conclusion that PCB got into the

interceptors from the 22nd to the 27th and was permitted by the company to remain there is well founded by the evidence. It was not until the latter date that the company did anything to remedy the continuance of the problem insofar as the interceptors are concerned. The company's permissiveness therefore started on the 22nd when it should have acted more diligently and continued to the 27th when it did do what was needed to be done. It permitted the deposit on each of those 6 days. In my opinion the word, "deposit" in the section refers also to the result and not just the act of depositing. Even if the last drop of PCB went into one of the interceptors on, say, the 25th the offence continued as long as the company permitted the deposit to remain in the interceptors.

The Crown conceded on the appeal that the company acted with due diligence from the 27th onward and that the conviction should not have been recorded for the 28th. Accordingly, the appeal is allowed to that extent only.

Following conviction a sentence of \$3,500.00 for each day from January 22 to 28, 1977 was imposed. In my opinion, the sentence was excessive. The company has no previous convictions. The spillage of the PCB was accidental and the gravamen of the offence is the failure of the company to react properly to it. The explosion of the transformer no doubt caused many operational difficulties in the pulp mill and I think that once its attention was directed fully to the effect of the spill the company acted responsibly. The cleanup has cost some \$200,000.00 for land fill. Dredging was considered but it was determined to be hazardous, although cheaper. The company acted as a good corporate citizen in accepting the more expensive solution.

The sentence appealed is allowed and a sentence of \$1,000.00 per day is substituted for January 22 to January 27, 1977 inclusive.

THE QUEEN v. SACOBIE AND PAUL

**New Brunswick Court of Appeal, Hughes, C.J.N.B., Limerick and Ryan, J.J.A.,
December 10, 1979, Fredericton, N.B.**

Authority of provincial Attorney-General to conduct prosecution under a federal statute other than the Criminal Code -- Fisheries Act -- New Brunswick Fishery Regulations -- Interpretation of Criminal Code.

Appeal by Crown from judgment of Harper, Prov. J.

An information was laid by a fishery officer who was an employee of the federal government. A Crown Prosecutor, appeared as counsel and agent for the Attorney General of New Brunswick. The provincial judge dismissed the information on the basis that only the federal Attorney General may prosecute the *Fisheries Act*. The N.B. Attorney General appealed the dismissal of the information.

Held, the appeal was allowed and the case was remitted to the trial judge to hear the evidence and determine the case on the merits. While the federal Attorney General has exclusive jurisdiction to prosecute the case if he appears, the provincial Attorney General has exclusive jurisdiction if the federal A.G. does not appear to prosecute a case under the *Fisheries Act*.

Limerick, J.A.:--This is an appeal by the Attorney General of New Brunswick by way of a stated case by His Honour Judge J.D. Harper, a Judge of the Provincial Court of New Brunswick against an order of that Judge whereby he dismissed an information on a preliminary objection that the prosecutor had no jurisdiction to conduct the prosecution.

The facts stated in this case are that a fisheries officer, acting under the authority of the *Fisheries Act*, R.S.C. 1970 Chapter F-14, laid an information under oath charging the two respondents herein with committing together an offence against the New Brunswick Fishery Regulations contrary to s.61(1) of the *Fisheries Act*.

After the two defendants had entered pleas of not guilty, Judge Harper requested counsel to enter their appearances. A Crown Prosecutor, appointed under the *Crown Prosecutors Act* of New Brunswick, stated he appeared "as counsel and agent for the Attorney General of the Province of New Brunswick". No one appeared on behalf of the Attorney-General of Canada.

Counsel for the accused took a preliminary objection challenging the legislative authority of the Attorney General of New Brunswick through his counsel or agent to conduct the prosecution under the *Fisheries Act*.

Judge Harper held that only the Federal Attorney General of his counsel or agent may prosecute violations of the *Fisheries Act*, and without calling on the informant to conduct the prosecution, he dismissed the information. He purported to so act under the authority of *R. v. Hauser et al.*, (1979) 8 C.R. (3d) 89 (S.C.C.).

When the appeal came on for hearing, it became apparent that two other appeals on the docket viz. *The Queen v. Schriver* and *Stevenson v. The Queen* involved the

same questions, (1) the right of persons, other than the Federal government, to lay an information charging a violation of a federal statute other than one dealing with criminal law enacted under the authority of s.91(27) of the *British North America Act*, and (2) the right of the Provincial Attorney General to conduct the prosecution of such an offence. Counsel representing the Crown and counsel for the four defendants in all three cases agreed to argue the three cases together.

In *R. v. Donald Schriver*, the information which charged an indictable offence under the *Narcotic Control Act* was laid by a municipal police officer and at the conclusion of a preliminary inquiry the Judge of the Provincial Court discharged the accused holding there was insufficient evidence to warrant a committal for trial. The Attorney General of New Brunswick thereupon preferred an indictment before a Judge of the County Court against the accused charging the same offence under the *Narcotic Control Act*. The Judge quashed the indictment holding that, under his interpretation of the Hauser case (supra), the Attorney-General of Canada had exclusive jurisdiction to prefer indictments under the *Narcotic Control Act*.

In *Donald William Stevenson v. The Queen* Judge George of the Provincial Court concluded that an information charging an indictable offence under the *Narcotic Control Act* which was laid by a municipal peace officer was void and that the Attorney-General of New Brunswick had no authority to conduct the prosecution of such a charge. An order of mandamus was made, on the application of the Attorney General of New Brunswick, by Mr. Justice Barry directing Judge George to proceed with the hearing of the case on the merits. From this order the defendant has appealed.

Counsel for all parties agree that:

- (1) Both the *Fisheries Act* and the *Narcotic Control Act* are within the exclusive legislative jurisdiction of Parliament.
- (2) The subject matter of those Acts does not come within the ambit of criminal law under s.91(27) of the *British North America Act*.
- (3) Section 27 of the Interpretation Act, R.S.C. 1970, c. I-23 applies so as to make all provisions of the Criminal Code relating to both summary convictions and indictable offences applicable to the prosecution of offences against any federal statute.
- (4) Parliament may delegate to anyone the authority to lay informations and conduct the prosecution of any federal offence other than an offence against criminal law.

Mr. Neill, counsel for some of the defendants, contended that in spite of any delegation of authority intended by s.2 of the *Criminal Code* to the Attorney General of a province that the Hauser case (supra) should be interpreted to mean that an exclusive constitutional power was vested in the Attorney General of Canada to conduct the prosecution of all offences against federal statutes other than criminal offences, relying on certain statements found in the reasons of some of the Judges in the Hauser case (supra).

With all due respect, the Judges of the Provincial Courts, the County Court Judge and counsel for the accused, have failed to comprehend the reasons for judgment delivered in the Hauser case.

In that case the Supreme Court of Canada was concerned with an determined only the right of the Attorney General of Canada:

1. to prefer indictments under the Narcotic Control Act,
2. to have the conduct of proceedings instituted at the instance of the Government of Canada in respect of a violation or conspiracy to violate any Act of the Parliament of Canada or regulation made hereunder other than the Criminal Code.

The Court was not concerned with the question as to whether or not the Attorney-General of a province could prefer an indictment under the *Narcotic Control Act* or whether he could conduct the prosecution thereof, nor was the Court concerned as to whether a person other than an agent of the Attorney General of Canada could lay an information under that Act.

Lord Denning once stated that it is erroneous to read into the reasons expressed in a case, referable to a given set of facts, an application thereof to another case based on a different set of circumstances which were not in the contemplation of the Court when it gave those reasons.

The various Courts whose decisions are in question in the appeals before us and counsel rely on statements made by Spence, J., Pigeon, J. and Dickson, J. in the Hauser case. It is not necessary to consider the reasons of Spence, J. as his reasons were not concurred in by any other of the seven Judges who sat on that appeal. In interpreting the reasons of Pigeon, J., who wrote for the majority of the Court and of Dickson, J. whose reasons were concurred in by Pratte, J., we must keep in mind that the principal question for determination by them was whether the subject matter of the *Narcotic Control Act* fell under federal legislative jurisdiction as being criminal law under s.91(27) of the *British North America Act* or under the authority of the Peace, Order and Good Government provisions of that Act:

The statements of the Judges relied on are the following:

Pigeon, J. at p. 100:

As to the interpretation of the definition of "Attorney General", I see no reason to disagree with the view taken by the Quebec Court of Appeal in Miller v. R., [1975] Que. C.A. 358, 30 C.R.N.S. 372, 27 C.C.C. (2d) 438, leave to appeal to Supreme Court of Canada refused 30 C.R.N.S. 372n (Can.). I find it clear that the effect of this enactment is to make the Attorney General of Canada the "Attorney General" in respect of all criminal proceedings instituted at the instance of the government of Canada and conducted by or on behalf of this government in respect of an offence or conspiracy pertaining to a statute other than the Criminal Code. This results in the exclusion of the attorney general of the province from any authority in respect of such proceedings so instituted.

And at p. 105:

Whatever may be said as to the necessity of limiting the extent of the federal power over criminal procedure so as to preserve provincial jurisdiction over the administration of justice in criminal matters, it appears to me that one must accept, at least, what is conceded by three provinces: unrestricted federal legislative authority over prosecutions for violations or conspiracies for violations of federal enactments which do not depend for their constitutional validity on head 27 of s.91 (criminal law). It appears to me that these provinces justly disclaim any constitutional power to subject the enforcement of federal statutes to their executive authority except in what may properly be considered as "criminal law".

Dickson, J. at p. 117:

Secondly, a clear distinction must be drawn between statutory construction and constitutional competence. As a matter of statutory interpretation, s. 2(2) of the Code may have the effect of excluding the provincial attorneys general only partially.

And at p. 144-145:

If s. 2(2) is properly characterized as merely increasing the number of persons authorized to prefer an indictment, one could not, I think, question the conclusion reached by Donnelly, J. In my view, however, as I have sought to show, s. 2(2) properly elucidated and characterized goes far beyond that and has the effect, generally speaking, of supplanting the provincial attorney general by the Attorney General of Canada, at the will of the latter, in the prosecution of any non-Code federal criminal offence.

In interpreting these statements it must be borne in mind that there were two constitutional questions before the Court, firstly, was the *Narcotic Control Act* supportable as being within Federal competency as being criminal law under heading 91(27) of the *British North America Act*, or was it supportable under Peace, Order and Good Government residual power; and secondly, if, as Dickson, J. found, it was criminal legislation, whether the Attorney General of Canada or the Attorney General of the Province had exclusive jurisdiction to enforce it.

The latter question only arose if the *Narcotic Control Act* was enacted by Parliament under its authority to enact criminal law. The *Hauser* case, by the majority decision of the Supreme Court of Canada, decided that issue; it is not criminal law. That decision is binding on this and all other Courts in Canada. Counsel all agree, for the purpose of this appeal, that the *Narcotic Control Act* is within the exclusive jurisdiction of Parliament and was not enacted under Parliament's legislative power over criminal law given by s. 91(27) of the *British North America Act*.

Dickson, J. therefore, when speaking of constitutional jurisdiction, predicated his comments on the premise that the *Narcotic Control Act* is criminal law and dissented therein from the majority judgment. He was very specific in stating, as quoted above, that we must be careful to distinguish between statutory interpretation and constitu-

tional competency. As there is no criminal enactment here involved, no constitutional question arises as to the power of the Attorney Generals.

The *British North America Act* constitutionally vests in Parliament the legislative power in respect of fisheries and narcotics and does not purport to vest any constitutional authority as such in the Attorney General of Canada, as it has been argued that it does in the Provincial Attorney General in criminal cases. The Federal Government can only exercise its constitutional powers over fisheries and narcotics by the enactment of legislation and by such legislation it may control the complete field in all aspects of both subject matters. It may therefore delegate authority including authority to enforce such legislation in either field to any person or officer it might deem advisable.

The constitutional argument relating to the powers of the Federal and the Provincial Attorney Generals arises out of the division of criminal jurisdiction between Parliament and the provincial legislatures by the *British North America Act*.

The *British North America Act* under s.91(2) vests in Parliament jurisdiction over The Criminal Law, except the Constitution of the Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters, and by s.92(14) vests in the Legislature of the provinces The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and Criminal jurisdiction, and including procedure in civil matters in those courts.

There is no such division of power between Federal and Provincial Governments in relation to the subjects matters which fall within the exclusive jurisdiction of Parliament and therefore no constitutional question arises as to the powers of the respective Attorney General.

Parliament has the exclusive right to legislate who may institute proceedings brought for the violation of Federal statutes other than criminal law; who may conduct such proceedings and which, if any, Attorney General may assume control of such proceedings. Parliament has enacted such legislation, viz. s.27(2) of the *Interpretation Act*, R.S.C. 1970, c.1-23 which is as follows:

s. 27(2) All the provisions of the Criminal Code relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of the Criminal Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

This subsection adopts the provisions of the *Criminal Code* relating to the prosecution of summary conviction and indictable offences. The only questions we are concerned with in this case are, therefore, not constitutional in nature, but of simply legislative interpretation.

Section 455 of the Code provides:

455. Any one who, on reasonable and probable grounds, believes that a person has committed an indictable offence, may lay an information . . .

There is no restriction on that broad delegation of authority to be found in the Criminal Code. Therefore, subject to any restrictions to be found in particular Federal Acts such as appears in the *Lord's Day Act* and the *Combines Investigation Act* which require previous authority from either the Provincial Attorney General or the Federal Attorney General, anyone may lay an information for an indictable offence.

The same is true in relation to summary conviction offences. Section 720 of the Code defines "informant" as meaning "a person who lays an information".

There is likewise no restriction in the *Criminal Code* limiting who may lay an information charging the commission of a summary conviction offence and from time immemorial such informations have been laid by private individuals, by municipal, provincial or federal peace officers, and by agents of the Provincial or Federal Attorney General. In the absence of any statutory restriction, I can perceive no reason to qualify or deny the right to any person, be he a private citizen, a municipal police officer or an agent of a provincial Attorney General, to lay an information for an offence arising out of the violation of a Federal statute other than one relating to a criminal offence.

The right in a municipal police officer to lay an information has been conferred by valid Federal legislation and the Judges of the Provincial Courts in the *Schrivver* and *Stevenson* cases (supra) erred in holding the informations to be void in those cases on the ground that they were not laid by agents of the Attorney General of Canada.

The authority of the Provincial Attorney General to conduct the proceedings in these three cases is also to be found in the provisions of the *Criminal Code* adopted by s.27 of the *Interpretation Act*. The Code provisions relate to the direct power of the "Attorney General" specifically in three major activities:

1. He may intervene to control or limit the prosecution of an offence by granting a "stay of proceedings" or may set aside such a stay.
2. He may prefer an indictment either following a preliminary inquiry or may initiate a new proceeding.
3. He may control the appeal from a verdict of acquittal or from sentence.

He is also inferentially involved and given the power to conduct prosecutions through counsel by the definition of "prosecutor" in s.2 of the Code. Prosecutor means "the Attorney General, or, where the Attorney General does not intervene, means the person who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them".

The Code defines Attorney General as follows:

s.2 "*Attorney General*" means the Attorney General or Solicitor General of a province in which proceedings to which this Act applies are taken and, with respect to

- (a) the Northwest Territories and the Yukon Territory, and

(b) proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a violation or of conspiracy to violate any Act of the Parliament of Canada or a regulation made thereunder other than this Act,

means the Attorney General of Canada and, except for the purposes of subsections 505(4) and 507(3), includes the lawful deputy of the said Attorney General, Solicitor General and Attorney General of Canada;

Parliament, in its definition of Attorney General, specifically states that the Attorney General of Canada is only included in the meaning of "Attorney General" for the purpose of the prosecution of a violation of any Act of Parliament or regulation made thereunder, other than one under the Criminal Code, where the prosecution is instituted at the instance of the Government of Canada and the proceedings are conducted by or on behalf of the Federal Government.

In the *Sacobie and Paul* case, although the stated case would seem to imply, the proceedings were instituted by or on behalf of the Federal Government, they were not conducted by that Government. No counsel appeared on behalf of the Attorney General of Canada. Counsel did appear however on behalf of the Provincial Attorney General.

The correct interpretation of "Attorney General", as it appears in the Code, is that the Attorney General of the Province is intended by the use of those words, in relation to the prosecution of offences of a criminal nature as well as in the prosecutions of offences in violation of statutes of Canada and regulations there under, other than those relating to criminal law where the Government of Canada has not both instituted and appeared to conduct the proceedings.

I concur with the reasoning of Lajoie, J.A. in *R. v. Miller* (1975) 30 C.R.N.S. 372 at 378, wherein he stated, inter alia,:

(c) When proceedings are instituted in a province in respect of a violation of an Act or Parliament of Canada other than the Criminal Code, the bill of indictment can be preferred and the proceedings conducted, by the Attorney General of the Province or by the Attorney General of Canada.

I would only add that if the proceedings are instituted by the Government of Canada, and the Attorney General of Canada or his agent appears to conduct that proceeding, the agent of the Attorney General of Canada would have exclusive authority. In all other cases, counsel for the Provincial Attorney General may appear and conduct the prosecution and if no counsel appears for the latter, the informant or his counsel may conduct the prosecution.

In the *Sacobie and Paul* case and in the *Stevenson* case there is no record of the Judge calling on the informant to proceed with his case. The Judge in each case dismissed the information because he held that counsel for the Provincial Attorney General, who was present to conduct the case for the prosecution, had no right to appear. Even if he had been correct in such view he should have called on the informant to proceed before he dismissed the information, particularly in the *Sacobie*

and Paul case where the informant acted on behalf of the Government of Canada and there was no suggestion that the information was a nullity.

In the *Stevenson* case the charge was laid by a municipal peace officer; the Federal Government not having instituted the proceedings had no right to conduct the prosecution of the offence.

Because Parliament has enacted legislation providing that anyone may lay an information for the violation of any Act of the Parliament of Canada including the Narcotic Control Act, the information in the *Stevenson* case was a valid information and the Judge of the Provincial Court erred in dismissing the information and in declining jurisdiction.

In the *Schrivver* case the Provincial Attorney General instituted proceedings by preferring an indictment. Because the Federal Government had not instituted any proceedings, the Attorney General of the Province was empowered to prefer an indictment and the Judge of the County Court erred in quashing it.

The statements of Pigeon, J. and Dickson, J. earlier referred to and relied upon by the trial Judges and counsel were all qualified statements and the qualifications made by them were either completely ignored or misinterpreted.

Pigeon, J., at page 100 of the Hauser case, stated:

I find it clear that the effect of this enactment (s.2 of Code) is to make the Attorney General of Canada the "Attorney General" in respect of all criminal (sic) proceedings instituted at the instance of the government of Canada and conducted by or on behalf of this government in respect of an offence or conspiracy pertaining to a statute other than the Criminal Code. this results in the exclusion of the attorney general of the province from any authority in respect of such proceedings so instituted.

The above underlined words qualify the effect of the finding so that the exclusion of the Provincial Attorney General is effective only when the proceedings are "so instituted", that is when instituted and conducted by the Federal Government. In all other cases there is no such exclusion.

Pigeon, J., et al p. 105 in stating

It appears to me that these provinces justly disclaim any constitutional power to subject the enforcement of federal statutes to their executive authority except .

..

did not imply a lack of constitutional power in the Federal Parliament to delegate authority to provincial executive power in such cases as the province might voluntarily accept that authority. He meant thereby that counsel for these three provincial governments disclaimed any executive power to override federal executive power over the prosecution of federal offences other than criminal offences. He did not imply thereby that the provincial executive power was lacking where the Federal government did not choose to exercise its executive power.

Dickson, J., in making the statement on pages 117 and 118 of the *Hauser* case, was speaking of the constitutional aspect of criminal law and not of federal offences other than under criminal law. His remarks were predicated on his dissenting judgment that the *Narcotic Control Act* was an enactment of criminal law under s.91(27) of the *British North America Act* and have no application to the legislative interpretation of federal statutes dealing with only non-criminal matters in the exclusive jurisdiction of Parliament.

Dickson, J. in stating at p. 144:

... s.2(2) properly elucidated and characterized goes far beyond that and has the effect, generally speaking, of supplanting the provincial attorney general by the Attorney General of Canada, at the will of the latter, in the prosecution of any non-Code federal criminal offence

was careful to qualify his opinion to those cases where the Attorney General of Canada exercised his "will" to take charge of the proceedings. The statement does not support the contention that the Provincial Attorney General is supplanted in any such case where the Attorney General of Canada has not chosen to appear by counsel to conduct the proceedings and was intended to exclude such a case from the conclusion arrived at.

Counsel for the accused argued that the authority of the Attorney General, both Federal and Provincial, and their agents, was constitutional competence to institute and conduct the prosecution of non-criminal Federal Statutes".

The authority of the Attorney General of Canada to institute and conduct prosecutions of non-criminal offences is not a constitutional but a statutory power. To argue, predicated on the constitutional power of the enforcement authorities, is to argue on a false premise; their authority is purely statutory when acting under any act other than one relating to criminal law.

It is not necessary in this case to deal with the constitutional question as to the right of Parliament to supplant the Provincial Attorney General by the Attorney General of Canada in criminal cases, as these are not criminal cases, and as no federal statute has been enacted purporting to supplant the Provincial Attorney General in criminal proceedings.

The suggestion of counsel that a decision that the Attorney General of Canada cannot conduct the prosecution of an offence for the violation of a Federal statute other than the Code, where the information is laid by someone other than a person on behalf of the Federal Government, would lead to a foot race between the Provincial and Federal Attorney General, is facetious and has no application to the situation before us. It could only arise when there were two informations laid for the same offence one being on behalf of the Attorney General of Canada and would not be settled, as implied, by reference to which information was first laid or to the so-called foot race.

The various Provincial Court Judges, as well as some counsel, have difficulty interpreting the *Hauser* reasons for judgment. There are other cases standing for judgment before Provincial Courts pending the decision of this Court. It must be

borne in mind that these reasons are intended to apply to prosecutions of Federal offences not founded under the heading of criminal law under s. 91(27) of the *British North America Act*. The definition of Attorney General in s. 2 of the Criminal Code refers to Federal Acts other than the Code. There are other Federal Acts, the *Lord's Day Act* which deal with criminal offences not included in the Code. This leaves unanswered the question as to the constitutionality of the definition of Attorney General in relation to such other Acts.

I will endeavour to cover the various situations which may arise individually so that the ruling of this Court may be evident in each case coming within the possible situations contemplated.

In the prosecution of an offence for the violation of a Federal statute, which does not depend on the heading of criminal law under s.91(27) of the *British North America Act* to support it constitutionally.

1. If the information is laid or the indictment is presented by the Government of Canada and counsel appears on behalf of the Attorney General of Canada to conduct the prosecution thereof, he has exclusive legislative jurisdiction.
2. If an information is laid by or on behalf of the Federal Government and counsel for the Provincial Attorney General appears and counsel for the Attorney General of Canada does not appear, counsel for the Provincial Attorney General has the sole exclusive right to conduct the prosecution.
3. If neither Attorney General appears by counsel or agent to conduct the prosecution, the informant, his counsel or agent, as the Code provides, may conduct the prosecution.
4. Anyone may lay an information for an offence against a Federal Act who has reasonable and probable grounds for believing such an offence occurred and that the person charged committed it if such Act does not restrict such right.
5. If an information is laid by anyone other than on behalf of the Federal Government, the Provincial Attorney General may appear by counsel or agent, as the Code requires, and conduct the prosecution.
6. If an information is laid by anyone other than by a Federal agent, and the Provincial Attorney General does not appear by counsel, the informant, his counsel or agent, as the Code provides, may conduct the prosecution.
7. Either the Attorney General of Canada or the Provincial Attorney General may institute a proceeding by preferring an Indictment in cases where there has been no committal for trial on the charge preferred.

The appeal by way of stated case in the *Queen v. Sacobie and Paul* is allowed. The trial Judge erred in holding that "only the Federal Attorney General or his counsel or agents may prosecute violations of the *Fisheries Act* of Canada".

The case is remitted to Judge Harper to hear the evidence and determine the case on the merits.

REGINA v. WESTERN FOREST INDUSTRIES LIMITED

British Columbia Provincial Court, Giles Prov. CT. J., Duncan, B.C., December 1, 1978

Defences - Due diligence - All reasonable care taken in the factual circumstances - Whether de minimus non curat lex applicable when trifling amount of debris in view of the magnitude and difficulty of operations.

Fisheries Act. R.S.C. 1970, c.F-14, s.33(2) - Unlawful deposition of a deleterious substance in a place in the vicinity of water frequented by fish.

Government Directives - Reasonable efforts to comply with government staff directives in clean-up operations.

The accused cleaned-up a silt and debris laden reservoir, located above a creek frequented by fish, in accordance with instructions given by Department of Fisheries staff. In doing so, the reservoir was opened and 300,000 gallons of sediment laden water gushed down the creek over a four hour period. Later, the reservoir floor was cleaned of remaining debris. During the operation, five cubic yards of about the total of 1400 to 1600 cubic yards of debris was deposited over the side of the reservoir where it would be carried into the creek with the first rains. This deposition was necessary in the circumstances to avoid the operator of the clean-up machinery from possibly losing his life.

On two charges under section 33(2) of the *Fisheries Act*, held, both counts are dismissed.

The clean-up is in accordance with Fisheries staff directives. It is unfair to blame the accused for the initial 300,000 gallon discharge, when this discharge is a direct result of following Fisheries staff directives.

The deposit of five cubic yards of debris is trifling in view of the magnitude and difficulty of the operations.

The defence of due diligence applies. The accused observed all of the Fisheries staff directions. The choice of depositing a small amount of deleterious substance was made only during a moment of crisis in order to avoid the risking of the clean-up operator's life. This is the only logical, reasonable and possible decision that could have been made. As such, the diligence and reasonable care to be exercised, as contemplated in *R. v. Sault Ste. Marie*. (1978) 3 C.R. (3d) 30, 7 C.E.L.R. 53 (S.C.C.) must be deemed to stop short of risking life and limb. The accused took all reasonable care, acted with due diligence and did what any group of reasonable men would have done in similar circumstances.

This decision is not being appealed.

Headnote from (1978), 9 CELR 57

Giles, J.: The defendant company is charged that contrary to section 33(2) of the *Fisheries Act* it did, firstly, unlawfully deposit and, secondly, cause to be

deposited a deleterious substance in a place, namely Ashburnham Creek, in the vicinity of Cowichan Lake, V.I., in water frequented by fish.

Western Forest Industries Limited, the defendant company, owns in fee simple the lands through which Ashburnham Creek flows on its way to Cowichan Lake. The company operates a large mill at a townsite known as Honeymoon Bay. In order to supply water for the mill and the inhabitants in the townsite, the company built a dam across Ashburnham Creek thereby forming a fair-sized reservoir. This dam and reservoir has been in existence many years and regularly each year, except in 1976, the company has cleared out the reservoir to rid of accumulated silt and debris (leaves, bark, twigs, etc.) which if left would seriously cut down the capacity of the reservoir.

In previous years the company on its own initiative and for its own benefit carried out this cleaning process by removing a plug close to the base of the dam and some two feet in diameter. Apparently this plug was always covered by several feet of silt and debris at the time of the cleanout. It had been the practice over the years to pull the plug in a motion parallel to the creek bottom, let the reservoir drain and then go in with heavy equipment and clean out what silt, gravel and other debris still remained by lifting it mechanically from the bed of the reservoir on the up-stream side of the dam and "dumping" it over the top of the dam to fall on the down-stream side, to be carried away in due course by the flow of the stream and chiefly at the time of the first fall freshet.

It is apparently, this last described part of the process - the actual "dumping" of the residue back into the Creek on the downstream side of the dam - that the Fisheries Officers seem mostly concerned with, in fact, their position is that the residue heretofore "dumped" over the dam should be shovelled into trucks and carted away.

Conferences were held between Fisheries and Conservation Officers on the one hand and Company officials on the other. The then Conservation Officer of the Duncan District, one Ackerman, took a firm stand on his requirements, while the company manager and plant superintendent doggedly maintained that the company's past performance was adequate. The company apparently went over Ackerman's head, and some evidence crept into the record referring to a pressured change of policy followed by a reversal to official support of Ackerman's position. There were also suggestions of temper and bad language. All this, of course, is not relevant at all; however, it does underscore the obvious fact that relations between Fisheries and Company were strained almost to open hostility, which unfortunately may well have coloured testimony at the trial and impaired the judgments of the parties at the time of the incident.

Shortly after reserving judgment in this issue, I became aware of possible error in the information. In each count the words "unlawfully" and "knowingly" appear, whereas both are absent in the section of the *Fisheries Act* under which the defendant is charged. No exception had been taken at the trial. I advised counsel and invited submissions dealing with this point and I have indeed received submissions. I will deal with this aspect later, and continue now to deal with the case on its merits.

On the 26th day of July, 1977, a meeting was held at the damsite and the method to be employed by the company to clean out its reservoir was fully canvassed.

Fisheries officials were presumably acting under section 33(1) of the *Fisheries Act*. In any event, the following letter was delivered to the defendant company on July 27th, 1977:-

262 Station Street,
Duncan, B.C.
V9L 1N1

Province of British Columbia
Ministry of Recreation
and Conservation
Fish and Wildlife Branch

July 26, 1977

Mr. B. Fraser,
Western Forest Industries Ltd.,
Honeymoon Bay, B.C.
V0R 1Y0

Dear Mr. Fraser:

With reference to our field inspection of the proposed gravel removal behind your company's dam on Ashburnham Creek on this date, the following stipulations were agreed upon:

- a) That the gravel is to be removed by truck from the site;
- b) That the water level behind the dam will be lowered to a point where only a small flow from the creek will be existing behind and through the dam;
- c) That a berm will be constructed to keep the above-mentioned flow away from the working area at all times; and
- d) That gravel removal operations will commence on July 28th, 1977, and that the operations will take approximately five days.

These measures are necessary to prevent silt from entering Ashburnham Creek as a result of these operations.

You might also be interested to learn that this summer Federal Fisheries have recorded the largest number of fry in the creek in years. This, we feel, is a result of the lack of silt in the system during critical summer months. With improved gravel removal operations from your dam site, the utilization of Ashburnham Creek by salmon and trout fry should increase significantly during future years.

Yours truly,

"A. Ackerman"
A. Ackerman
Conservation Officer
Duncan District

cc. J.C. Lyons, Regional Director, Nanaimo
S. Mahannah, Habitat Protection
Technician, Nanaimo
D. Morrison, Habitat Protection
Biologist, Nanaimo
B. Caspell, Fisheries Officer Duncan
D.F. Hammond, Manager, W.F.I.
Honeymoon Bay

This letter purports to set out the terms of an "Agreement", but in truth it was hardly that. Steps (a) to (d) inclusive are described as "stipulations", and if these were complied with "silt would be prevented from entering Ashburnham Creek".

In cross-examination Ackerman stated that he "had explained quite thoroughly" his requirements of the defendant company; that the so-called stipulations were "basically directives", that, when asked if he was aware that sediment covered the whole base of the dam to a point several feet above the plug, he admitted that he was, and that Mr. Fraser, the Company's superintendent had explained this to him, as well as the method of pulling the plug, with which method Ackerman was in agreement.

When asked if the Company's officials had carried out the terms of the letter of July 26, 1977, it is significant that Ackerman made in reply the bald statement: "Yes, they had no choice".

Mr. Lefebvre, who was put in charge of the whole operation, supervised Baird Contracting an independent contractor hired by the Company to remove the sediment. Mr. Lefebvre described how the "by-pass" was constructed and how some fourteen hundred cubic yards of sediment was trucked away. He also said that the fact the plug was below the sediment level "was visible to everybody".

Mr. Hammond, the Plant Manager, gave evidence to the effect the reservoir fills up with "gravel from the hills", that it had been two years since it was drained and contained approximately 300,000 gallons of water. He stated the plug was pulled in the usual manner on July 27th, 1977, and the work was completed three days later.

It seems that at this point the company had been acting entirely pursuant to the "directives" of the Conservation Officer, Ackerman, as contained in the letter of July 26th, 1977. The observations of an eye-witness, when the plug was pulled are significant. Mr. Fraser, who was present, stated that the moment the plug was pulled, the water gushing through the two foot hole caused a "vortex" to occur into which was dragged sediment, gravel and other debris. He described a jet of water two feet in diameter at the down-stream side of the dam, dirty brown in colour, coming from some several feet above the base of the dam and hitting the stream-bed some eight to ten feet away. This jet of sediment and debris laden water continued with diminishing intensity for some four hours after the pulling of the plug.

The Crown submitted a brochure of photographs (exhibits 26(1)-(24)), taken by the conservation Officers shortly after the dam was drained. These photographs do indeed show serious deposits of silt and debris; however, I am finding as a fact that the despoiling of the creek as indicated in the photographs was due almost exclusively to the pulling of the plug and the flooding that occurred for some four hours after, all of which was pursuant to the letter of July 26th, 1977, and the Fisheries Departments "directives" contained therein.

After the reservoir was drained the clearing away of sediment and gravel proceeded apparently satisfactorily and without incident or complaint. As mentioned before, Baird Contracting Ltd., carted away some fourteen hundred cubic yards of gravel.

At this point the second contingency arose, also apparently overlooked by the Conservation Officer - that of putting the plug back in place. This was a delicate operation and one fraught with danger. The water had gone from the upstream side of the dam and there remained a residue of what could best be described as "sludge", up to the level of the bottom of the plug hole. To get the plug back some of the

remaining debris had to be removed and the working area was so mushy heavy equipment could not safely be used.

Wise after the event, the Crown suggested several things; men in hipwaders with shovels, a dragline operating from the bank et cetera. It was at this point that the Company was faced with Shylock's problem - "one pound of flesh, but not one drop of blood". In their wisdom the company officials decided to use a light frontend loader.

At this point the duties of Baird contracting had been completed as can be seen from the following evidence:

48 Q *And I take it to the best of your knowledge that your crew cleaned the area of the reservoir out as far as they could consistent with the equipment that you have, is that correct?*

A. *That's right.*

49 Q *And you used the best equipment that you could for this job?*

A. *Yes*

50 Q *Now, one final question. You have mentioned that you didn't go right up to the face, to the very edge of the dam on the upstream side, is that correct?*

A. *No.*

51 Q *And that's because with your equipment it would be dangerous for your equipment to go that close to the face, is that correct?*

A. *Yes*

52 Q *You went as close as you could, I take it?*

A. *Yes, that's right.*

The Company took over at this point using their own frontend loader and operator. The operator had not been working such a piece of equipment for some years and much was made by the Crown of his lack of skill. I find this aspect exaggerated and possibly the only difference resulting from the use of a more experienced operator would have been that he would not have attempted the job at all. The operator, one Graves, described his task to be that of cleaning away the debris so that the plug could be replaced. He was working for just under an hour with a one and one-quarter yard bucket. Mr. Lefebvre was in charge. The desirable course of action was for the loader to bring back each bucket of debris to the river bank; but with the consistency of the sludge, time was of the essence and furthermore the task was hazardous. Mr. Lefebvre gave evidence that one wheel of the machine went into a hole, and it looked "as if the whole machine was going over". Mr. Lefebvre said he was "real scared". At this moment, an emergency situation developed and the fact is that Graves dumped some five cubic yards over the dam to fall on a concrete skirt at the base of the dam on the downstream side, where it remained for some time. The Company was not at any time requested to remove it.

For reasons to be summarized later it is only this latter dumping of the five cubic yards by Graves for which the company could possibly be held responsible.

To explain this dumping at first Mr. Fraser used the seemingly exculpatory statement "inadvertent dumping"; not being entirely satisfied himself with this explanation he went on to say "it was a matter of necessity", which seems closer to the mark. Lefebre told Ackerman that it was "a management decision", which I am finding as a fact was the true state of affairs.

As to the actual amount of debris actually dumped over the dam, Graves states he was working only one hour before he had to stop. His machine had a one and one-quarter yard bucket and he stated that most of what was dumped over was water. The defence called a Mr. MacDonald, experienced in estimating bulk quantities such as hog-fuel and sawdust. He saw the pile of debris at the time and estimated it at five cubic yards. On cross-examination he stated it "could have been a bit more". Ackerman described the pile and stated he thought it amounted to eighty cubic yards, but withdrew the answer before being cross-examined on it. I accept the estimate of about five cubic yards given by MacDonald as being the amount dumped over the dam, and this appears to be substantiated by several photographs submitted as exhibits by the Crown.

Before proceeding further, it is well to dispose of the points established by the experts called by the Crown. I am finding as a fact the waters in question are frequented by fish and by fry, for that matter. I am also finding that the releasing of sand, silt and other debris into Ashburnham Creek, as happened here, is deleterious to fish.

The larger question here, in my view, is given all the surrounding circumstances of this case, and in particular, the very active participation of the Fisheries Officials in what can almost be described as a joint venture, at its best, and bureaucratic bungling and interference, as witnessed by the directives which the defendant Company had "no choice" but to follow, contained in the letter of July 26th, 1977, at its worst, - that is, given these aspects, is it right that the Company should in anyway be held responsible?

It should be noted that for the prior twenty years this dam had been opened and the reservoir been drained and 300,000 gallons of sediment laden water had presumably gushed down Ashburnham Creek. In the letter of July 27th, 1977, the Federal Fisheries are reported by Ackerman "to have recorded the largest number of fry in the Creek in years". Other witnesses spoke of the increasing fruitfulness of this Creek as a spawning ground and the increasing number of salmon and fry to be found in these waters year by year.

The defendant Company, Western Forest Industries, for over twenty years has used Ashburnham Creek to provide drinking water for its townsite at Honeymoon Bay, and water for its plant and processes located and carried on there. Three hundred inhabitants depend for their livelihood on this plant and indirectly on this Creek. The past use of this natural resource has not apparently detracted from its increasing usefulness as a spawning ground for fish.

After many years, man in general, and industry in particular, have finally become aware of the great need to protect our natural resources, including fish and wildlife. No one longer questions this. If, however, environmentalists are to continue their good work, or for that matter, hold their own, then they must maintain a basic minimum level of good public relations. To accomplish this end, they should rid their ranks of crackpots and zealots, and above all, eschew the power-hungry bureaucrat when in the throws of an ego trip.

Nature provides abundantly - the environment has survived forest fires, cave-ins, and earthquakes from time immemorial; rivers have been diverted from their courses; human and animal populations have been decimated by plague, flood, fire and famine. But life survives and returns; it seems little more is required beyond reasonable monitoring from time to time, when nature may on rare occasions seem to be getting the worst in the fight for survival.

When an irreconcilable conflict of interests develops between man and his environment, then the interest of man of necessity must be deemed to be paramount.

In the present case there are only two occasions when it could be said that a deleterious substance had been deposited: firstly, what appears to be the major deposit - the flooding of the creek when the plug was removed from the dam; secondly, the deposit by Graves, an agent of the defendant Company, of the five cubic yards of debris "dumped" over the dam.

In dealing with the first of these - there is no doubt that 300,000 gallons of silt laden water flowing down the creek for some four hours would have a deleterious effect on the creek as a spawning ground, at least for a period of time. But what happened was entirely at the direction of Ackerman, in accordance with his "stipulations", and following his "directives", all as outlined in his letter to the Company of July 26th, 1977. In this letter appear the rather astonishing words: "These measures are necessary to prevent silt from entering Ashburnham Creek as a result of these operations". He could only have been referring to the residue of silt, leaves and gravel left in the reservoir after it had been drained, and which were to be trucked away.

To be fair to both sides, it would seem that neither the Fisheries Branch nor the Company had within their contemplation the effect of removing the plug from the dam. As far as the Company was concerned it had been draining the dam and dumping the residue over the dam for twenty years. It was done in early fall and whatever deposits were left on the down-stream side merely awaited the "first fall freshet". That is, when the first rains came and the dam overflowed all debris was washed away. As one witness said, "it was there today and completely gone tomorrow". In short, to the Company officials the reservoir could not be cleaned out without first removing the plug from the dam. They had done this often before and gave this aspect of the problem little thought.

As far as the Fisheries officials are concerned, they either did not think at all about the effect of removing the plug or they thought the stipulations they had imposed upon the Company would be adequate. In either case it would be manifestly unfair and contrary to natural justice to hold the defendant Company to blame for this deposit, when it results entirely from the directives of Ackerman, who admitted the

Company had faithfully carried out the intent of his letter in all respects - "they had no choice".

I now come to the second deposit - the five cubic yards deposited by Graves. Perhaps the first thing to realize is that pursuant to the Fisheries Branch "directives" between 1400-1660 cubic yards of silt, gravel and other debris were in fact trucked away, which each for the previous twenty years had been dumped over the dam for the fish to contend with. I find that five cubic yards in fifteen hundred cubic yards (to take an average) amounts to one part in three hundred or .3%. If the letter of July 26th 1977, records a contract - and the words "the following stipulations were agreed upon" were used - then I would be inclined to find there had been "substantial completion"; if the letter is merely a list of instructions then I would be inclined to find there had been "substantial compliance"; and in view of the magnitude and the difficulty of the operations and the trifling amount of debris (.3%) which was dumped over the dam, I would be inclined to find (as I was urged by defence counsel) that the doctrine *de minimis non curat lex* applies.

However, I do not think it is necessary to make any of the above findings, as I feel the defence of "due diligence" is open to the defendant in this instance, and I refer to *R. v. Sault Ste Marie*, a recent decision of the Supreme Court of Canada, handed down May 1st 1978, and reported in 3. C.R. (3rd) 30.

It was agreed by Counsel at the trial that this was an offence of "strict liability", but the *Sault Ste Marie* case - I am not too sure of this - was not referred to. In any event, the report has since come into my hands. In brief, between the two traditional positions (the requirement of proof of *mens rea* by the Crown, on the one hand, and absolute liability upon proof of the act done, on the other) the Supreme Court of Canada has placed a third category, one of strict liability on proof of the doing of the prohibited act, leaving it open to the accused to avoid liability by proving that he took all reasonable care.

These categories are set out on p. 53, of the Supreme Court of Canada judgment (Dickson, J.):

I conclude for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

1. Offences in which mens rea consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed or by additional evidence.

2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent or if he took all reasonable steps to avoid the particular event. These offences may

properly be called offences of strict liability. Estey C.J.H.C. so referred to them in Hickey's case.

3. *Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.*

It remains to examine the facts in the case at bar with particular reference to the circumstances surrounding the dumping of the five cubic yards in the process of replacing the plug in the dam. In the light of all existing circumstances can it be fairly said that the defendant company, its employees and agents, took all reasonable care and did what reasonable men would have done in the circumstances?

The bulk of the silt and gravel had been trucked away, some fifteen hundred cubic yards of it, and all that remained was to replace the plug. The dumping of the five cubic yards was the price paid for the safe replacing of the plug without loss of life or limb. In an emergency situation on slushy footing, a light front-end loader had already dropped one wheel in a hole, and it looked "as if the whole machine was going over - I was real scared".

The Company had faithfully observed all Ackerman's directions at this moment, and there is no reason in the world to believe that that dumping of five cubic yards was an act of petty defiance; it was in fact, a necessity. The plug had to be replaced and the operator brought back to safety quickly. In a moment of crisis a choice had to be made between the depositing of some deleterious substance on the one hand, and the avoiding of it by risking a man's life on the other. In my opinion, the diligence and reasonable care to be exercised, as contemplated by Dickson, J. in the *Sault Ste Marie case*, must be deemed to stop short of risking life and limb.

In a moment of crisis Company officials made the only logical, reasonable and in my view, possible decision, and it was a management decision. The operator was directed to dump the five cubic yards and get back to safety as soon as possible. It was a reasonable, sound and authoritative decision, made by men who are accustomed to making such decisions, and they are to be commended for it.

I have no hesitation in finding as a fact that the defendant Company took all reasonable care, acted with due diligence and did what any group of reasonable men would have done in similar circumstances, and for these reasons the company has avoided liability and I so find.

It should be recorded that the defence called evidence on its own behalf and half of the Crown's witnesses were Company officials. I was impressed by the fairness of the evidence they gave and by the impartial way the Crown placed all the facts before the Court.

Briefly, before closing, I refer to an earlier reference I have made to the inclusion of the words "unlawfully" and "knowingly" in the Information. I invited written submissions on the possible effect of this, especially, with reference to the reasons in the *Sault Ste Marie case*. I prefer the position taken by Crown, that is, that the words in question are mere surplusage, do not invalidate the counts, and need not be proved. However, I consider the point now somewhat academic, as the case is dismissed on other grounds.

I wish to thank all counsel for their very able assistance.

The case is dismissed on both counts.

REGINA v. PIONEER TIMBER CO. LTD.

**British Columbia Country Court, Campbell Co. Ct. J., Campbell River, B.C.,
March 7, 1979**

Act of God - Defence - What constitutes an Act of God.

Defences - Act of God - Reasonable care - Public welfare offence of strict liability - Fisheries Act, R.S.C. 1970, c.F-14, s. 33(2).

Deleterious Substance - Sediment - Effect of high concentration on fish and fish habitat.

Evidence - Sufficiency - Deposition of sediment by accused.

Fisheries Act R.S.C. 1970, c.F-14, s. 33(2) - Permitting the deposit of a deleterious substance into a place where the substance may enter water frequented by fish - Defences - Public welfare offence.

Sediment - Deleterious substance - Effect of high concentration on food chain of fish, physiology of fish and on the actual habitat of fish.

The accused - respondent was charged with permitting the deposit of sediment, a deleterious substance near a tributary stream under conditions in which the sediment may enter water frequented by fish.

The accused, while rebuilding an old logging road, deposited some blasted clay and gravel material on the lower side of the road directly above the head wall of a tributary stream. The following day, during a spring thaw, a flood of water ran down the road surface and poured over the edge of the road, through the deposited material and into the tributary stream. Two conservation officers found that what had been a clear stream the day before was now dirty. The sediment causing the water to become dirty came from the clay and gravel deposit.

On an appeal from a conviction under s. 33(2) of the *Fisheries Act*, R.S.C., c. F-14, as amended, *held*, the appeal is dismissed.

An offence prescribed under s. 33(2) of the *Fisheries Act* is a public welfare offence where proof of *mens rea* is not necessary, leaving it open to the accused to avoid liability by proving that it took all reasonable care.

The defence of act of God is not available given the late spring season, the snow pack that existed when the work commenced and the fresh fall of snow, all of which made it reasonable to expect a run off of water.

The defence of taking all reasonable care or due diligence is also not available as the accused did not take reasonable steps to avoid the occurrence in that it did not ditch or divert the water from the area of the tributary stream in anticipation of a normal water run-off.

The clay and gravel material as shown in evidence is a deleterious substance. This sediment is deleterious to fish in respect of the effect of high concentrations of sediment on the food chain of fish, the effect on the physiology of fish and the effect on the actual habitat of fish.

Further, there is sufficient evidence to prove that the sediment was deposited by the accused even though there is no proof that the sediment actually sampled was deposited by the accused.

This decision is not being appealed.

J.S. Godrey, for the Attorney-General of British Columbia, respondent.

E.C. Chiasson, for the accused, appellant.

Headnote from (1979), 9 CELR 66.

Campbell, Co. Ct. J.: This is an appeal pursuant to the provisions of Section 748 of the *Criminal Code* from a conviction under Section 33(2) of the *Fisheries Act* R.S.C. 1970, c. F-14 and amending Acts, of a charge that the respondent "on or about the 22nd day of April 1977, near Port Hardy, County of Nanaimo, did permit the deposit of sediment, a deleterious substance, near Tributary No. 13 Creek, a place under conditions where such deleterious substance aforesaid may enter water frequented by fish, to wit: the Keogh River."

This charge arose as a result of certain activities of servants and agents of the appellant on the 21st and 22nd days of April 1977, in the Port Hardy area. The trial was held at Port Hardy before His Honour Judge Watts on February 15th, 1978, and on April 4th, 1978 the learned Provincial Court Judge found the appellant guilty and imposed a fine of \$3,000.00. From that conviction this appeal is brought.

The evidence establishes the following: In April 1977 the appellant directed the opening of an old logging road. There had been a slide on this road in 1975 resulting in its closure and to re-open it it was necessary to rebuild the road at the point of that slide. This necessitated the blasting of the conglomerate on the cliff face on the upper side of the road. The effect of blasting the conglomerate was to break it into its constituents of gravel and clay. The bank on the lower side of the road at the point of such blasting was in effect the head wall of Tributary 13, which water course commences below the road and empties into the Keogh River some 1.6 miles downstream.

Blasting was carried out on April 21st, 1977, and a bulldozer was then used to rebuild the road using some of the blasted material for that purpose and piling the remainder of that material along the lower side of the road directly above the head wall of Tributary 13. That same day, April 21st, Slaney, a research biologist of the Fish and Wildlife Branch, travelled up the Keogh River to a point above the confluence of Tributary 13 and that river and found the water in the river was perfectly clear. At that time he heard blasting coming from the hill above the head wall of Tributary 13. On April 22nd, the next day, he again went up the Keogh River and at a point .6 miles downstream from the confluence of Tributary 13 and that river he saw that the river water was dirty. He proceeded further up the river and found that the source of the dirt was the confluence of Tributary 13 where the water was thick and dirty. He found

the water of the Keogh River above the confluence of Tributary 13 was clean. He took some water samples from various points of the river. Later that afternoon he returned to the scene with officials of the appellant and another conservation officer, Mr. Pratt. They went to the point where the road repairs were being carried out and there found the bulldozer at work and loose material from the blasting being piled along the lower side of the road directly above the head wall of Tributary 13 and slowly descending in a stream down the side of the bank towards Tributary 13.

Slaney and Pratt returned to the confluence of Tributary 13 and the Keogh and took further water samples. As a result of the observations of the fisheries officers and the analysis of those samples this charge was laid.

Wright, the contractor for the appellant, gave evidence regarding the weather conditions on the days in question. He experienced no difficulty in getting to the job site by truck on April 19th and 20th but did on April 21st because of a snowfall of three to four inches on the road surface. He testified there were three to four feet of snow in the area above the job site. On April 22nd he found a great deal of the snow had disappeared and a flood of dirty water approximately a foot deep and one and a half to two feet wide was running down the road surface picking up mud, silt and debris before it poured over the edge of the road, through the old slide area to the commencement of Tributary 13 and on into Tributary 13. Some of the flood waters ran through the material excavated by the appellant and some passed through the material which had been cast along the lower side of the road. A ditch was cut on the inside of the road by the bulldozer to assist the water to continue to run down the road.

Wright testified that he had worked in the area for 15 years and had never seen a thawing phenomenon such as he saw on April 22nd. He described it as a "Chinook" similar to those which he had experienced in southeastern British Columbia. The monthly meteorological summary for the month of April 1977 from the Port Hardy Airport was filed as an exhibit. This demonstrated a warming trend from April 21st to April 22nd but was not accepted by the trial Judge as confirming the extreme variation of temperature suggested by Wright's evidence.

Although the notice of appeal advances several grounds of appeal these resolve themselves into the three main points argued by the appellant at the hearing of the appeal. These are:

- (1) *That the appellant exercised reasonable care and that such being the case it is entitled to be acquitted under the principles enunciated in R. V. Sault Ste Marie, (1978) 3 C.R. (3d) 30.*
- (2) *That the Crown must prove the sediment in the Keogh River was deleterious and the evidence fails to establish such was the case.*
- (3) *There was no proof that the sediment actually measured was deposited by the appellant assuming that the measured concentrations could be harmful to fish.*

Turning to the first point advanced by the appellant I should note that the judgment in this case was pronounced prior to that of the Supreme Court of Canada in the *Sault Ste Marie* case (*supra*) on May 1st 1978. This latter case deals with the

distinction between strict and absolute liability and the applicability of the defence of reasonable care in certain circumstances. The judgment of Dickson J. indicates that such a defence is available in appropriate circumstances and holds there are three categories of offences rather than the traditional two. After a thorough review of the authorities the learned Justice of the Supreme Court of Canada makes the following observations at page 53 of the report:

I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

- 1. Offences in which mens rea consisting of some positive state of mind such as intent knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed or by additional evidence.*
- 2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves considerations of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Estey D. J.H.C. so referred to them in Hickey's case.*
- 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.*

Offences which are criminal in the true sense fall in the first category. Public welfare offences would prima facie be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly" or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the legislature, the subject matter of the legislation, the importance of the penalty and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

Section 33(2) of the *Fisheries Act* under which the charge in this case arises provides as follows:

33(2) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

Subsection (4) does not apply here.

Applying the criteria enumerated by Dickson, J. in the *Sault Ste Marie* case to the legislation here I have no difficulty in concluding that the offence here is one of the second category, i.e. a public welfare offence where proof by the Crown of *mens rea* is not necessary; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care.

Thus the defence of reasonable care is open to the appellant here.

The appellant says that the deposit of sediment in the Keogh River was caused by an act of God or, alternatively, the sudden thaw and resultant run off were completely unexpected and improbable and in the circumstances the appellant exercised reasonable care.

The question as to what is an act of God was considered in *The Queen v. Canadian Pacific Railway Company*, (1965) 2 Ex. C.R. 222 at page 241 where Dumoulin, J. states:

What is considered an Act of God?

Halsbury's Laws of England Third Edition, vol. 8, p. 183, no. 317 under the caption of "What constitutes an act of God" defines it as follows:

An act of God, in the real sense of the term, may be defined as an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against; or, more accurately, as an accident due to normal causes, directly and exclusively without human intervention, and which could not have been avoided by any amount of foresight and pains and care reasonably to be expected of the person sought to be made liable for it, or who seeks to excuse himself on the ground of it. The occurrence need not be unique, nor need it be one that happens for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. The mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence (when in other words, it does not imply any law from which its recurrence can be inferred) does not prevent that phenomenon from being an act of God. It must, however, be something overwhelming and not merely an ordinary accidental circumstance, and it must not arise from the act of man.

Black's Law Dictionary, Fourth Edition, 1951, Vo. Act of God, emphasizes that the event attributed to the intervention of purely natural causes ...could not have been prevented or escaped from by any amount of foresight or prudence, or by any reasonable degree of care or diligence, or by the aid of any appliances which the situation of the party might reasonably require him to use.

An exculpatory plea of this nature is, necessarily, an extreme one, which must evince most if not all of the characteristic traits predicated of it. Otherwise, the expression, act of God, becomes a self-serving synonym for the negligent inaction of man.

In *R. v. North Canadian Enterprises Ltd.* 20 C.C.C. (2d) 242, a decision of the Provincial Court of Ontario, the charge was that of polluting waters contrary to the *Ontario Water Resources Act* when a dam was breached after an excessively heavy rainfall. One of the defences required an extraordinary operation of nature to which no man contributed, which the accused could not have foreseen and could not have guarded against. Since there was no evidence that the amount of rainfall was so extraordinary as to be overwhelming and unforeseeable this defence failed.

The learned Provincial Court Judge in reviewing the authorities regarding the definition of "act of God" said the following at page 245 of the report:

How does one define 'act of God' in the legal sense? We are concerned with the legal as opposed to the ecclesiastical or biblical interpretation for in the latter cases, as was said by Lord Esher, M.R. in Pandorf & Co. v. Hamilton, Fraser & Co. (1886) 17 Q.B.D. 670 at p. 675.

In the older simpler days I have myself never had any doubt but that it did not mean the act of God in the ecclesiastical or biblical sense, according to which almost everything is said to be the act of God...

(emphasis added).

The learned law Lord went on to observe that in a mercantile sense it meant an extraordinary circumstance which could not be foreseen and which could not be guarded against.

Middleton, J. in *McQuillan v. Ryan* (1921) 64 D.L.R. 482 at p. 292-3, 50 O.L.R. 337 at p. 349, put it this way: 'act of God' ... must relate to an event which cannot be foreseen or which if it can be foreseen cannot be guarded against.

The Court put it very succinctly in *Nugent v. Smith* (1876) 1 C.P.D. 423, where at pp. 435-6 the Court said:

The rain which fertilises the earth and the wind which enables the ship to navigate the ocean are as much within the term 'act of God' as the rainfall which causes a river to burst its banks and carry destruction over a whole district, or the cyclone that drives a ship against a rock or sends it to the bottom. Yet the carrier who by the rule is entitled to protection in the latter case, would clearly not be able to claim it in case of damage occurring in the former.

Here the evidence does not disclose any extraordinary occurrence which in all the circumstances the accused could not have foreseen and could not have guarded against.

In *Pleet v. Canadian Northern Quebec R. Co.* (1921), 64 D.L.R. 316, 50 O.L.R. 223, 26 C.R.C. 227 (C.A.) (affirmed (1923) 4 D.L.R. 1112, 26 C.R.C. 238), Ferguson, J.A. said at p. 323 D.L.R. p. 230 O.L.R. as follows: 'where the goods are lost, destroyed or damaged by an operation of nature to which no man contributed, the loss is an act of God. (Emphasis added). I would ask you to note

particular the words 'by an operation of nature to which no man has contributed'.

In the case now before me the learned Provincial Court Judge rejected the "act of God" defence saying, in effect, as I read his reasons, that there was no evidence to support such a contention. He in effect rejected Wright's evidence with respect to a sudden thaw or "Chinook" . However, even if he were wrong in so rejecting such evidence, and I am not prepared to say that he was, in my view the evidence does not establish that what occurred in this case was an "Act of God" in the sense defined in the *Canadian Pacific and North Canadian Enterprises cases*. Given the season of the year and the snow pack that existed when the work commenced, plus the fresh fall of snow, it was reasonable to expect a run off of water to some extent. The appellant did virtually nothing which it might reasonably be expected to do in the way of ditching or other means of diverting water from the area of Tributary 13 in anticipation of a normal water run off. Further, there was clearly "a contribution by man" or "human intervention" and the flow of water, sediment and debris in the direction it took could have been avoided or guarded against by those in charge of the appellant's operation. On the evidence as a whole I am unable to find that the appellant took reasonable steps to avoid the occurrence and thus establish the due diligence which would entitle it to an acquittal pursuant to the principles enunciated in the *Sault Ste Marie* case pertaining to strict liability offences.

Turning now to the appellant's second contention that the Crown has failed to prove that the sediment in the Keogh River was deleterious. In my opinion there was ample evidence before the learned Provincial Court Judge on which he could find that it had been proven beyond a reasonable doubt that the sediment in the Keogh River was deleterious. The evidence of both Pratt and Slaney leads to such a conclusion. Slaney's evidence makes it clear that sediment is deleterious to fish. I refer specifically to his evidence with respect to the effect of high concentrations of sediment on the food chain of fish, the effect on the physiology of fish, and the effect on the actual habitat of fish.

The result is that I find that there was ample evidence from which the Court could conclude that the sediment in the Keogh at the time in question was deleterious to fish.

With respect to the appellant's third ground of appeal that there was no proof that the sediment actually measured was deposited by the appellant, assuming that the measured concentration could be harmful to fish, I am similarly satisfied that there was sufficient evidence to support the finding of the learned Provincial Court Judge. This is clear from the evidence of Slaney who heard the blasting on April 21st and who the next day saw the condition of the river both above and below the confluence of Tributary 13 and who also saw the water going from the road to the area of the headwaters of Tributary 13. In my opinion the evidence in this regard is overwhelming and the Provincial Court Judge could come to no other rational conclusion that the material put in place by the appellant reached the Keogh River and was in the river and of such concentration that it could be deleterious to fish. In addition, on the evidence he could fairly conclude that the concentration of sediment measured in the samples taken was caused by the activities of the appellant.

The result is that the grounds for appeal advanced by the appellant are rejected and the appeal is therefore dismissed.

FOWLER v. THE QUEEN

Supreme Court of Canada; Maitland, Ritchie, Pigeon, Dickson, Beetz, McIntyre, Chouinard, J.J.

Appeal hearing December 4 and 5, 1979, judgment pronounced June 17, 1980.

Fisheries Act, R.S.C. 1970, Chap. F-14, S.S. 33(3), Constitutional Validity, application to logging, lumbering, land clearing.

The sole issue in the appeal is whether subsection 33(3) of the Fisheries Act, R.S.C. 1970, Chap. F-14 is within the legislative competence of the Parliament of Canada. The Appellant and provincial intervenants attack constitutional validity. The criteria for establishing liability under subsection 33(3) are wide. Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. There was no evidence to indicate that the full range of activities caught by the subsection do cause harm to the fisheries.

Held Subsection 33(3) is not necessarily incidental to the federal power to legislate in respect of sea coast and inland fisheries and is ultra vires of the federal Parliament.

Counsel at hearing:

For the appellant; defendant

Duncan W. Shaw
Richard C. Gibbs

For the respondent; federal crown

T.B. Smith, Q.C.
H.J. Wruck

For the intervenants:

The Attorney General of British Columbia:

E.R.A. Edwards

The Attorney General of New Brunswick:

Alan Reid

Martland J.: The sole issue to be determined in this appeal is that which is raised in the constitutional question propounded in the order of the Chief Justice of this Court:

"Is Section 33(3) of *The Fisheries Act*, R.S.C. 1970, c. F-14, within the legislative competence of the Parliament of Canada?"

Section 33 of *The Fisheries Act* appears under the heading "Injury to Fishing Grounds and Pollution of Waters" and contains, *inter alia*, the following subsections:

33. (1) No one shall throw overboard ballast, coal ashes, stones, or other prejudicial or deleterious substances in any river, harbour or roadstead, or in any water where fishing is carried on, or leave or deposit or cause to be thrown, left or deposited, upon the shore, beach or bank of any water or upon the beach between high and low water mark, remains or offal of fish, or of marine animals, or leave decayed or decaying fish in any net or other fishing apparatus; such remains or offal may be buried, ashore above high water mark.

(2) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

(3) No person engaged in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.

(4) No person contravenes subsection (2) by depositing or permitting the deposit in any water or place

(a) of waste or pollutant of type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act; or

(b) of a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection (13).

(5) Any person who contravenes any provision of

(a) subsection (1) or (3) is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars for a first offence, and not exceeding ten thousand dollars for each subsequent offence; or

(b) subsection (2) is guilty of an offence and liable on summary conviction to a fine not exceeding fifty thousand dollars for a first offence, and not exceeding one hundred thousand dollars for each subsequent offence.

(6) Where an offence under subsection (5) is committed on more than one day or is continued for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued.

(11) For the purposes of this section and sections 33.1 and 33.2,

"deleterious substance" means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process or degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,

and without limiting the generality of the foregoing includes

(c) any substance or class of substances prescribed pursuant to paragraph (12) (a),

(d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to paragraph (12) (b), and

(e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (12) (c);

"deposit" means by discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;

"water frequented by fish" means Canadian fisheries waters.

(12) The Governor in Council may make regulations prescribing

(a) substances and classes of substances,

(b) quantities or concentrations of substances and classes of substances in water, and

(c) treatments, processes and changes of water

for the purpose of paragraphs (c) to (e) of the definition "deleterious substance" in subsection (11).

The respondent contends that subsection (3) of s. 33 is valid legislation because of the legislative authority of Parliament in respect of "Sea Coast and Inland Fisheries" under s. 91.12 of *The British North America Act*. The appellant submits

that subsection (3) falls within provincial legislative powers, relying upon sections 92.5, 92.10, 92.13 and 92.16 of the Act:

- 92.5 The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
- 92.10 Local Works and Undertakings... .
- 92.13 Property and Civil Rights in the Province.
- 92.16 Generally all Matters of a merely local or private Nature in the Province.

This case is concerned with the prosecution of the appellant on two counts, as follows:

- COUNT 1 that Dan Fowler, from April 27, 1975, to May 27, 1975, while engaged in logging, did UNLAWFULLY put debris into water frequented by fish, to wit: at or near Forbes Bay, in the County of Vancouver, Province of British Columbia, CONTRARY TO THE PROVISIONS OF SECTION 33 OF THE FISHERIES ACT, as amended;
- COUNT 2 That Dan Fowler, from April 27, 1975 to May 27, 1975, while engaged in logging, did UNLAWFULLY knowingly permit to be put, debris into water frequented by fish, to wit: at or near Forbes Bay, in the County of Vancouver, Province of British Columbia, CONTRARY TO THE PROVISIONS OF SECTION 33 OF THE FISHERIES ACT, as amended.

The facts of the case are stated by the Provincial Court Judge by whom the case tried, as follows:

The facts of the case are that the accused, Dan Fowler, was carrying on a logging operation at a place known as Forbes Bay on the east shore of Humphrey Channel in the County of Vancouver, Province of British Columbia. Dan Fowler was subcontracting the removal of logs and timber from this land for the purpose of the logs being towed away. The evidence inferred that Dan Fowler was carrying on a normal and usual logging operation. As part of the logging operation the logs were removed from the forest by dragging the logs with a caterpillar tractor and in the course of dragging these logs they were dragged across a small stream, which is so small that it has no name. There was no exact measurement of the width of the stream but a photograph would indicate it is a few feet wide. From this logging operation there was debris deposited in the stream bed. From the photograph tendered as an exhibit and from the description given in evidence the debris consisted of limbs, branches or tops of trees.

This stream flowed into Forbes Bay which is salt water, part of the Coastal water of British Columbia. The stream at some times contained fish, the Fishery Officer said that the stream was used for the spawning of two species of salmon, Coho and Pink, and for the rearing of the Coho fry.

There was no evidence tendered by the Crown that the deposit of the debris affected or injured the fish or the fry in any way. On cross-examination the Fishery Officer said that this type of debris deposited in the stream could be a deleterious substance affecting the biological oxygen demand in the stream and that the fish eggs and the fry had a high oxygen demand. The Fishery Officer on cross-examination said that the debris could affect the number of fry by damaging the eggs in the gravel spawning ground. The Fishery Officer further said that every time something is done to the stream it may have a far reaching effect or little effect.

The appellant was acquitted at trial. The trial judge held as follows:

I find that Section 33(3) of the Fisheries Act is not certain and effective to exercise the power of Parliament under Section 91(12) of the B.N.A. Act and since it does interfere with the power of the provinces under Section 92(5) and 92(13), Section 33(3) is ultra vires Parliament.

The respondent appealed this decision and the County Court Judge allowed the appeal. The appeal to the Court of Appeal by the appellant was dismissed. The appellant, with leave, has appealed to this Court.

The Court of Appeal held that subsection 33(3) was within Parliament's power to enact because it was "legislation clearly in relation to the matter of inland fisheries and particularly to the preservation of fish". The Court relied upon the first proposition of Lord Tomlin in *Attorney-General for Canada v. Attorney-General for British Columbia and others*, [1930] A.C. 111 at p. 118. Lord Tomlin, in that case, stated four propositions, as follows:

Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordship's Board and as the result of the decisions of the Board the following propositions may be stated:-

(1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s. 92: see Tennant v. Union Bank of Canada ([1894] A.C. 31).

(2) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: see Attorney-General for Ontario v. Attorney-General for the Dominion ([1896] A.C. 348).

(3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the

Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91: see *Attorney-General of Ontario v. Attorney-General for the Dominion* ([1894] A.C. 189); and *Attorney-General for Ontario v. Attorney-General for the Dominion* ([1896] A.C. 348).

(4) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see *Grand Trunk Ry. of Canada v. Attorney-General of Canada* ([1907] A.C. 65).

Counsel for the appellant contends that in order to uphold the legislation in issue the respondent must establish that it falls within the third proposition enunciated by Lord Tomlin in that case.

The earliest case in this court in which the scope of the federal power to legislate in relation to sea coast and inland fisheries is *The Queen v. Robertson* [1882], 6 S.C.R. 52 which was concerned with the validity of an instrument called a lease of fishery whereby the Minister of Marine and Fisheries purported to lease for a term of nine years a portion of the Miramichi River in New Brunswick for the purpose of fly fishing for salmon. The lessee's claim to the ownership of the fishing in that portion of the river was successfully resisted in the New Brunswick Courts by persons who owned a portion of the river. The lessee then filed a petition of right against the Crown in the Exchequer Court claiming compensation.

In the course of his judgment, Ritchie C.J., at p. 120, said this:

... I am of opinion that the legislation in regard to 'Inland and Sea Fisheries' contemplated by the British North America Act was not in reference to 'property and civil rights' -- that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries, in other words, all such general laws as ensure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection,...

At page 123, he said further:

To all general laws passed by the Dominion of Canada regulating "sea coast and inland fisheries" all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large.

The scope of federal power to legislate under s. 91.12 of *The British North America Act* was discussed by the Privy Council in the following two cases, from which I quote:

Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia, [1898] A.C. 700 at 712:

Their Lordships are of opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading, "Sea-Coast and Inland Fisheries" in s. 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the time of the year during which fishing is to be allowed or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature.

Attorney-General for Canada v. Attorney-General for Quebec, [1921] 1 A.C. 401 at p. 432:

... There is everywhere a power of regulation in the Dominion Parliament, but this must be exercised so as not to deprive the Crown in right of the province or private persons of proprietary rights where they possess them.

Reference to the first quoted passage in the judgment of Ritchie, C.J. in the *Robertson* case was made by Chief Justice Laskin in *Interprovincial Co-Operatives Limited et al v. The Queen*, [1976] 1 S.C.R. 477 at p. 495, a case which dealt with provincial legislation for the protection of provincial property rights in inland fisheries. The Chief Justice, who delivered the judgment of himself and Judson and Spence JJ., which dissented in the result, made the following statement which was not the subject of disagreement by the majority:

... It is, in my view, untenable to fasten on words in a judgment, such as the words "tending to their regulation, protection and preservation", which appear in the reasons in The Queen v. Robertson, and read them as if they have literal constitutional significance. Federal power in relation to fisheries does not reach the protection of provincial or private property rights in fisheries through actions for damages or ancillary relief for injury to those rights. Rather, it is concerned with the protection and preservation of fisheries as a public resource, concerned to monitor or regulate undue or injurious exploitation, regardless of who the owner may be, and even in suppression of an owner's right of utilization.

The meaning of the word "fishery" was considered by Newcombe J. in this Court in *Reference as to the Constitutional Validity of Certain Sections of the Fisheries Act, 1914*, [1928] S.C.R. 457 at p. 472:

In Patterson on the Fishery Laws (1863) p. 1, the definition of a fishery is given as follows:

A Fishery is properly defined as the right of catching fish in the sea, or in a particular stream of water; and it is also frequently used to denote the locality where such right is exercised.

In Dr. Murray's New English Dictionary, the leading definition is:

The business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water.

The above definitions were quoted and followed by Chief Justice Davey in *Mark Fishing v. United Fishermen & Allied Workers Union* (1972), 24 D.L.R. (3d) 585 at pages 591 and 592. Chief Justice Davey at page 592 added the words:

The point of Patterson's definition is the natural resource, and the right to exploit it, and the place where the resource is found and the right is exercised.

The legislation in question here does not deal directly with fisheries, as such, within the meaning of those definitions. Rather, it seeks to control certain kinds of operations not strictly on the basis that they have deleterious effects on fish but, rather, on the basis that they might have such effects. *Prima facie* subsection 33(3) regulates property and civil rights within a province. Dealing, as it does, with such rights and not dealing specifically with "fisheries", in order to support the legislation it must be established that it provides for matters necessarily incidental to effective legislation on the subject matter of sea coast and inland fisheries.

In *Attorney-General for Canada v. Attorney-General for British Columbia and Others*, to which reference has already been made, the Attorney General for Canada sought to support provisions in the *Fisheries Act, 1914*, which required the obtaining of a federal licence in order to operate, for commercial purposes, a fish cannery or, in British Columbia, a salmon cannery or curing establishment. It was in this case that Lord Tomlin stated his four propositions regarding conflicts between federal and provincial jurisdiction.

The federal argument was that the legislation in issue was valid under s. 91.12 as being directly or incidentally in relation to sea coast and inland fisheries. It was argued that the operation of canning and curing establishments was inseparably connected with the conduct of fisheries.

The legislation was held to be *ultra vires* of Parliament. Lord Tomlin said at pages 121-22:

It may be, though on this point their Lordships express no opinion, that effective fishery legislation requires that the Minister should have power for the purpose of enforcing regulations against the taking of unfit fish or against the

taking of fish out of season, to inspect all fish canning or fish curing establishments and require them to make appropriate statistical returns. Even if this were so the necessity for applying to such establishments any such licensing system as is embodied in the sections in question does not follow. It is not obvious that any licensing system is necessarily incidental to effective fishery legislation, and no material has been placed before the Supreme Court or their Lordship's Board establishing the necessary connection between the two subject matters. In their Lordship's view, therefore, the appellant's second contention is not well founded.

The impugned sections confer powers upon the Minister in relation to matters which in their Lordship's judgment *prima facie* fall under the subject "property and civil rights in the province", included in s. 92 of the British North America Act, 1867. As already indicated, these matters are not in their Lordships' opinion directly or incidentally by any of the subjects enumerated in s. 91.

Counsel for the respondent supports the legislation on the ground that it is preventive legislation intended to protect and preserve fish. He contends that its validity does not depend on showing that the operations to which it relates cause actual harm to a fishery.

The broad scope of the legislation in question is well illustrated in the following passages from the judgment of the Provincial Court Judge at trial:

From evidence given in this case and also from judicial notice of the geography of the British Columbia coast and from that which is advanced in argument by both counsel, I have taken into consideration that on the coast of British Columbia where there are substantial logging operations there are innumerable streams, riverlets, and creeks flowing from the land to the various inlets and waters adjacent to the British Columbia coast which is the salt water and portion of the ocean frequented by fish and that the words of the section "into any water frequented by fish or that flows into such water" includes all these creeks, streams and riverlets of free flowing water that accumulate and ultimately flow into the ocean no matter how small and whether or not at any particular part of the water is at that point frequented by fish.

The scope of this legislation covers the handling of any wood material by loggers and land clearers in respect to almost any water in Canada. This section would affect every log, piece of lumber or tree that is so placed or dumped into any river, lake, stream or ocean in Canada from which there is detached therefrom any slash, stump or debris. I cannot conceive that the booming operations, the log drives and similar type of logging enterprises could be carried out without depositing some debris into the waters used for that purpose. If section 33(3) does not require the additional proof that the deposit of the debris affects the preservation of fish then every such booming operation and log drive would be committing an offence against section 33(3).

The criteria for establishing liability under subsection 33(3) are indeed wide. Logging, lumbering, land clearing and other operations are covered. The substances which are proscribed are slash, stumps and other debris. The amount of the substance

which is deposited is not relevant. The legislation extends to cover not only water frequented by fish but also water that flows into such water, ice over any such water and any place from which slash, stumps and other debris are likely to be carried into such water.

Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries. Furthermore, there was no evidence before the Court to indicate that the full range of activities caught by the subsection do, in fact, cause harm to fisheries. In my opinion, the prohibition in its broad terms is not necessarily incidental to the federal power to legislate in respect of sea coast and inland fisheries and is *ultra vires* of the federal Parliament.

I would allow the appeal, set aside the judgment of the Court of Appeal and the County Court and restore the judgment at trial. The appellant is entitled to his costs throughout.

NORTHWEST FALLING CONTRACTORS LTD. v. THE QUEEN

Supreme Court of Canada; Martland, Ritchie, Pigeon, Dickson, Beetz, McIntyre, and Chouinard, J.J.;

Appeal heard December 5, 1979, Judgment pronounced July 18, 1980

Constitutional law -- Fisheries -- Federal legislation prohibiting deposit of deleterious substance in water frequented by fish - valid exercise of federal fisheries authority.

Information - accused applying for prohibition on grounds that the information was multiplicatous -- no ambiguity in count alleging one particular mode of offence -- no greater jeopardy from several counts.

The accused was charged with depositing a deleterious substance as a result of an oil spill. The accused applied for an order to prohibit the Provincial Court Judge from hearing the trial. The two issues considered by the Supreme Court of Canada were (i) whether it was within the legislative competence of the Parliament of Canada to enact subsection 33(2) of the Fisheries Act, and (ii) whether the charges contained in the information were multiplicitous.

Held, the appeal should be dismissed.

Subsection 33(2) was *intra vires* of the Parliament of Canada and the information was satisfactory and did not prejudice the accused in the preparation of his defence by ambiguity.

Counsel at hearing:

For the appellant (accused):

Brian A. Crane, Q.C.

For the respondent (Crown):

T.B. Smith, Q.C.

H.J. Wruck

For the intervenants:

The Attorney-General of New Brunswick:

Alan Reid

The Attorney-General of Newfoundland:

James A. Nesbitt, Q.C.

Martland, J.: The main issue which is to be determined in this appeal is as to whether it was within the legislative competence of the Parliament of Canada to enact subsection 33(2) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended.

Subsection (2) is one of a number of provisions appearing in the section which comes under the heading "Injury to Fishing Grounds and Pollution of Waters". The following are the relevant subsections of s. 33:

33 (1) No one shall throw overboard ballast, coal ashes, stones, or other prejudicial or deleterious substances in any river, harbour or roadstead, or in any water where fishing is carried on, or leave or deposit or cause to be thrown, left or deposited, upon the shore, beach or bank of any water or upon the beach between high and low water mark, remains or offal of fish, or of marine animals, or leave decayed or decaying fish in any net or other fishing apparatus; such remains or offal may be buried ashore, above high water mark.

(2) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substances may enter any such water.

(3) No person engaged in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.

(4) No person contravenes subsection (2) by depositing or permitting the deposit in any water or place

(a) of waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act; or

(b) of a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection (13).

(5) Any person who contravenes any provision of

(a) subsection (1) or (3) is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars for a first offence, and not exceeding ten thousand dollars for each subsequent offence; or

(b) subsection (2) is guilty of an offence and liable on summary conviction to a fine not exceeding fifty thousand dollars for a first offence, and not exceeding one hundred thousand dollars for each subsequent offence.

(6) where an offence under subsection (5) is committed on more than one day or is continued for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued.

...

(11) For the purposes of this section and sections 33.1 and 33.2,

"deleterious substance" means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,

and without limiting the generality of the foregoing includes

(c) any substance or class of substances prescribed pursuant to paragraph (12) (a),

(d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to paragraph (12) (b), and

(e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (12) (c);

"deposit" means by discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;

"water frequented by fish" means Canadian fisheries waters.

(12) The governor in Council may make regulations prescribing

(a) substances and classes of substances

(b) quantities or concentrations of substances and classes of substances in water, and

(c) treatments, processes and changes of water

for the purpose of paragraphs (c) to (e) of the definition "deleterious substance" in subsection (11).

Section 2 of the Act contains the following definitions:

"Canadian fisheries waters means all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada.

"fish includes shellfish, crustaceans and marine animals and the eggs, spawn, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.

The information setting out the charges against the appellant is as follows:

The informant says that he has reasonable and probable grounds to believe and does believe that Northwest Falling Contractors Ltd., and Gulf Oil Canada Limited, on or about the 4th day of April, 1978, A.D., in the County of Vancouver, in the Province of British Columbia, did unlawfully deposit a deleterious substance into water frequented by fish, to wit: Cooper Reach, Head of Loughborough Inlet.

CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED.

Count 2: The informant says that he has reasonable and probable grounds to believe and does believe that Northwest Falling Contractors Ltd., and Gulf Oil Canada Limited, on or about the 4th day of April, 1978, A.D., in the County of Vancouver, in the province of British Columbia, did unlawfully permit the deposit of a deleterious substance into water frequented by fish, to wit: Cooper Reach, Head of Loughborough Inlet.

CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED.

Count 3: The informant says that he has reasonable and probable grounds to believe and does believe that Northwest Falling Contractors Ltd., and Gulf Oil Canada Limited, on or about the 4th day of April 1978, A.D., in the County of Vancouver, in the province of British Columbia, did unlawfully permit the deposit of a deleterious substance in a place under such conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter water frequented by fish to wit: Cooper Reach, Head of Loughborough Inlet.

CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED.

Particulates were furnished by the respondent to the appellant in the following form:

At approximately 8:15 on the morning of April 4th, 1978, Captain R. Davis of the F.P.L. Bonilla Rock noticed an oil slick at the Head of Cooper Reach, slick was approximately one mile long. After investigation it was found that on the morning of April 3rd Dennis Stevson, Box 2086, Squamish, barge operator of the Gulf Oil barge, "Gulf Logger" delivered approximately 17,000 gallons of diesel fuel to tanks owned by Northwest Falling Contractors Ltd. There were four tanks resting on an old rotten log. Log broke causing pipe to break on bottom of one tank, spilling 3,000 gallons of diesel fuel into Cooper Reach, Head of Loughborough Inlet.

Before any plea had been entered, the appellant applied to the Supreme Court of British Columbia for an order of prohibition. The order was sought upon three grounds. Only two of those grounds were argued before this Court, i.e., that the information did not disclose an offence known to the law and, further, that the information was multiplicitous. The appellant also challenged the decision of the Court of Appeal that prohibition was not an available remedy to attack the charge as being defective. The first ground is based on the contention that subsection 33(2) was *ultra vires* of Parliament to enact.

The application for an order of prohibition was dismissed and this decision was confirmed on an appeal to the Court of Appeal of British Columbia. The appellant, with leave, then appealed to this Court.

The appellant attacks the validity of subsection 33(2) on the grounds that it is not legislation in relation to "Sea Coast and Inland Fisheries" (s. 91.12 of *The British North America Act*), but that it is legislation in relation to the pollution of water generally, or is legislation for the protection of all animal life in the water.

I will deal with the second point first. The argument is founded upon the definition of "fish" in s. 2 of the Act. It is said that this definition is too broad. However, federal legislative jurisdiction under s. 91.12 of *The British North America Act* is not a mere authority to legislate in relation to "fish" in the technical sense of the word. The judgments in this Court and in the Privy Council have construed "fisheries" as meaning something in the nature of a resource.

Chief Justice Ritchie, in the first judgment of this Court dealing with s. 91.12, *The Queen v. Robertson*, (1882) 6 S.C.R. 52, said, at p. 120:

... I am of opinion that the legislation in regard to 'Inland and Sea Fisheries' contemplated by the British North America Act was not in reference to 'property and civil rights' -- that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries, in other words, all such general laws as ensure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the

local legislatures were, previously to and at the time of confederation in the habit of enacting for their regulation, preservation and protection,...

Viscount Haldane, in *Attorney-General for Canada v. Attorney-General for Quebec*, [1921] 1 A.C. 413, at p. 428, said:

... As this Board said in the British Columbia case in 1914, the object and effect of the provisions of s. 91 were to place the management and protection of the cognate public rights of navigation and fishing in the sea and tidal waters exclusively in the Dominion Parliament and to leave to the Province no right of property or control in them. These rights, as was observed, are rights of the public in general, and in no way special to the inhabitants of the Province.

The meaning of the word "fishery" was considered by Newcombe J. in this Court in *Reference as to the Constitutional Validity of Certain Sections of the Fisheries Act*, 1914, [1928] S.C.R. 457, at p. 472:

In Patterson on the Fishery Laws (1863) p. 1, the definition of a fishery is given as follows:

A Fishery is properly defined as the right of catching fish In the sea, or in a particular stream of water; and it is also frequently used to denote the locality where such right is exercised.

In Dr. Murray's New english Dictionary, the leading definition is:

The business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water.

The above definitions were quoted and followed by Chief Justice Davey in *Mark Fishing v. United Fishermen & Allied Workers Union* (1972), 24 D.L.R. (3d) 585, at pages 591 and 592. Chief Justice Davey at page 592 added the words:

The point of Patterson's definition is the natural resource, and the right to exploit it, and the place where the resource is found and the right is exercised.

Chief Justice Laskin, in *Interprovincial Co-Operatives Limited et al v. The Queen*, [1976] 1 S.C.R. 477, at p. 495, referred to the federal legislative power as being "concerned with the protection and preservation of fisheries as a public resource".

Shellfish, crustaceans and marine animals, which are included in the definition of "fish" by s. 2 of the Act, are all part of the system which constitutes the fisheries resource. The power to control and regulate that resource must include the authority to protect all those creatures which form a part of that system.

The appellant's main argument was that the legislation under attack is really an attempt by Parliament to legislate generally on the subject matter of pollution and thus to invade the area of provincial legislative power over property and civil rights. He points to the very broad definition of "water frequented by fish" in subsection 33(11) which refers to "Canadian fisheries waters" which, under s. 2, includes "all waters in the territorial sea of Canada and all internal waters of Canada". He also

refers to the broad scope of the definition of "deleterious substance". When these definitions are applied to subsection 33(2), it is said that the subsection is really concerned with the pollution of Canadian waters.

The charges laid in this case do not, however, effectively bring into question the validity of the extension of the reach of the subsection to waters that would not, in fact, be fisheries waters "or to substances other than those defined in paragraph (a) of subsection 33(1)". The charges relate to diesel fuel spilled into tidal waters. The task of the Court in determining the constitutional validity of subsection 33(2) is to ascertain the true nature and character of the legislation. It is necessary to decide whether the subsection is aimed at the protection and preservation of fisheries. In my opinion it is.

Basically, it is concerned with the deposit of deleterious substances in water frequented by fish, or in a place where the deleterious substance may enter such water. The definition of a deleterious substance is related to the subsection being deleterious to fish. In essence, the subsection seeks to protect fisheries by preventing substances deleterious to fish entering into waters frequented by fish. This is a proper concern of legislation under the heading of "Sea Coast and Inland Fisheries".

The situation in this case is different from that which was considered in *Dan Fowler v. Her Majesty the Queen*, a judgment of this Court recently delivered. That case involved the constitutional validity of subsection 33(3) of the *Fisheries Act* and it was held to be *ultra vires* of Parliament to enact. Unlike subsection (2), subsection (3) contains no reference to deleterious substances. It is not restricted by its own terms to activities that are harmful to fish or fish habitat. The basis of the judgment in the *Fowler* case is set out in the following passage:

Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries.

In my opinion, subsection 33(2) was *intra vires* of the Parliament of Canada to enact. The definition of "deleterious substance" ensures that the scope of subsection 33(2) is restricted to a prohibition of deposits that threaten fish, fish habitat or the use of fish by man.

The appellant contended that an order of prohibition should have been granted because the charges contained in the information were multiplicitous.

In *The Queen v. Sault Ste. Marie*, (1978) 2 S.C.R. 1299, a somewhat similar violation was charged in omnibus fashion in a single count, i.e., discharging or depositing, or causing, or permitting the discharge of material. This generic charge was held not to be duplicitous. At p. 1308, it is said:

In my opinion, the primary test should be a practical one, based on the only valid justification for the rule against duplicity: does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge?

If there is no ambiguity in a count alleging several modes of commission of one offence, a *fortiori* there is no ambiguity in a count alleging one particular mode of commission of an offence. The fact that there are several counts, each alleging a different mode, does not make it any more difficult for the accused to know what case he has to meet or to prepare his defence. He is not placed in greater jeopardy if the counts relate to one delict, because, in view of the judgment of this Court in *Kienapple v. The Queen* [1975] 1 S.C.R. 729, he could not be convicted on more than one count.

In view of the fact that I consider the information to be satisfactory, there is no need to consider whether the Court of Appeal was correct in holding that prohibition was not an available means of attacking the information on the grounds of multiplicity.

I would dismiss the appeal.

REGINA v. CANADIAN INDUSTRIES LIMITED

***New Brunswick Court of Appeal, Hughes, C.J.N.B., Ryan and Richard, J.J.A.,
Fredericton, New Brunswick, September 9, 1980***

*Environmental law - Water pollution - Pollution of waters by mercury --
authority of federal Crown to prosecute in view of Canada - New Brunswick Accord --
Fisheries Act, R.S.C. 1970 -- Application for Prohibition.*

The accused made an application for prohibition to stop the trial on an information containing 14 counts of depositing mercury in excess of the authorized amount. The accused argued that the federal Crown had delegated the responsibility to administer section 33 of the *Fisheries Act* to the Province of New Brunswick and that the federal Crown could not prosecute the accused. The accused argued two other grounds for dismissing the information.

Held, the Canada - New Brunswick Accord for the Protection and Enhancement of Environmental Quality did not prevent the federal Crown from prosecuting the accused.

The Accord was entered into without legislative sanction or executive authority and therefore does not have the force of law. The constitutional validity of subsection 33(2) was upheld by the Supreme Court of Canada in the Northwest Falling Contractors Ltd case, and subsection 510(5) of the Criminal Code was applicable to render the information sufficient. The application of the accused for an order of prohibition was not supportable on any of the grounds and the application of the accused was dismissed.

*R. Duke, for the Federal Crown
R.J. Tingley, for the accused*

Hughes, C.J.N.B.:— This is an application by Canadian Industries Limited (herein referred to as "CIL") for an order to prohibit His Honour Judge Ayles or any other Judge of the Provincial Court from continuing with the trial of CIL on an information sworn to by Philip Heneberry, an officer of Environment Canada, before Judge Ayles on June 14, 1979, which contained 14 counts, each alleging that CIL, a body corporate carrying on business at Dalhousie, in the County of Restigouche, Province of New Brunswick, on fourteen different dates:

did unlawfully deposit a deleterious substance, namely water containing mercury exceeding 0.00250 Kg per reference tonne of chlorine in the water of the Restigouche River at Dalhousie, New Brunswick, contrary to the provisions of section 33(2) of the Fisheries Act, being Chapter F-14 of the Revised Statutes of Canada, 1970 and amendments thereto.

The prosecution of CIL on these charges was adjourned for various reasons on a number of occasions after CIL appeared by counsel on June 25, 1979, in response to a summons issued by Judge Ayles. The following is a resume of the events leading up to the present application as established by the affidavit of counsel for CIL in support of his application for a summons returnable before this Court:

(1) On June 25, 1979, on motion of counsel for the Attorney General of Canada the information was amended by the addition of the words "being frequented by fish" after the words "Restigouche River" wherever they appeared in the information. Counsel for CIL in his affidavit deposed that prior to the amendment being allowed by the trial Judge there was no evidenciary basis for the amendment.

(2) On July 23, 1979, counsel acting on behalf of CIL entered a plea of "not guilty" to all counts in the information.

(3) On January 23, 1980, Judge Ayles refused leave to counsel for CIL to move pursuant to s. 732(1) of the Criminal code for an order quashing the information on the ground the trial Judge erred in allowing the amendment to the information granted on June 25, 1979 but granted leave to move for an order to quash the information based on the alleged legislative incompetence of Parliament to enact s. 33(2) of the Fisheries Act, c. F-14, R.S.C. 1970 and amendments thereto.

(4) At an adjourned hearing held February 26, 1980, Judge Ayles disallowed the motion to quash the information on the ground of the alleged legislative incompetence of Parliament to enact s. 33(2) of the Fisheries Act but granted leave to CIL to move to quash the information on the ground of an alleged delegation of authority to prosecute cases under s. 33(2) of the Fisheries Act conferred on the Province of New Brunswick by the Canada-New Brunswick Accord for the Protection and Enhancement of Environmental Quality which motion was disallowed by the trial Judge on March 25, 1980 who thereupon set June 3, 1980 for the trial of the information.

(5) On April 8, 1980, Mr. Justice Angers, upon the application of counsel for CIL, issued a summons returnable before the Court of Appeal seeking an order to prohibit Judge Ayles or any other judge of the Provincial Court from continuing with the trial of CIL on the information sworn June 14, 1979 on the following grounds:

1. Subsection (2) of Section 33 of the Fisheries Act, R.S.C. 1970, Chapter F-14, as amended is ultra vires the Parliament of Canada insofar as it is legislation relating to the exercise of proprietary rights by persons within the Province of New Brunswick over the quality of internal waters of the Province of New Brunswick, therefore, the said subsection does not create an offence and Judge L.C. Ayles of the Provincial Court therefore exceeded his jurisdiction in issuing the Summons referred to herein and is without jurisdiction to conduct any further proceedings in relation thereto.

2. That the right to prosecute alleged violations of Section 33(2) of the Fisheries Act, Chapter F-14, R.S.C., 1970 as amended has been delegated to the Province of New Brunswick pursuant to a Canada-New Brunswick Accord for the Protection and Enhancement of Environmental Quality, and therefore, the said Phil Heneberry, an Officer of Environment Canada, did not have the authority to lay the

information and Judge L.C. Ayles of the Provincial Court therefore exceeded his jurisdiction in issuing the Summons referred to herein and is without jurisdiction to conduct any further proceedings in relation thereto.

3. That the allowance of the Crown amendment of the information by the addition of the words "being water frequented by fish" on the 6th day of November, A.D. 1979, was not supported by evidence as required by Section 732(2) of the Criminal Code and therefore the information without the amendment discloses no offence known at law and Judge L.C. Ayles of the Provincial Court therefore exceeded his jurisdiction in issuing the Summons referred to herein and is without jurisdiction to conduct any further proceedings in relation thereto.

At the hearing of the application before this Court the Attorney General of New Brunswick intervened in the proceeding and counsel acting on his behalf appeared, having filed a factum in support of CIL's contention that the enactment of s. 33(2) of the Fisheries Act is beyond the legislative competence of the Parliament of Canada and that the section does not create an offence known at law.

After hearing the submissions of counsel for CIL and of counsel for the prosecution on grounds 2 and 3 it was agreed that the Court should defer rendering its judgment on the application until the Supreme Court of Canada should deliver judgment which it had reserved in the case of Northwest Falling Contractors Ltd. v. the Queen which involved the question of the legislative competence of the Parliament of Canada to enact s. 33(2) of the Fisheries Act which was raised as ground 1 in the instant case. On July 18, 1980, the Supreme Court in a unanimous decision in that case upheld the constitutional validity of s. 33(2) of the Fisheries Act and it follows that CIL's application for an order of prohibition insofar as it is based on ground 1 must fail.

The second ground upon which this application is based is that even if s. 33(2) of the Fisheries Act be found to be within the legislative competence of Parliament the Government of Canada has delegated to the Department of Environment of the Province of New Brunswick the right to administer and enforce the Chlor-Alkali Mercury Liquid Effluent Regulations, being P.C. 1977-1978 made pursuant to s. 33 and s. 34 of the Fisheries Act. Counsel for CIL submitted that the delegation of enforcement powers by Canada to the Province of New Brunswick is to be found in the Canada-New Brunswick Accord for the Protection and Enhancement of Environmental Quality dated October 21, 1975.

The power to designate federal agents to lay informations and to conduct the prosecution of offences against the Fisheries Act and regulations made thereunder is clearly within federal competence: See R. v. Hauser et al. (1979) 8 C.R. (3d) 89. However, I find nothing in the Accord which refers to any provision of the Fisheries Act or any regulation made thereunder or which confers any power, exclusive or otherwise, upon provincial authorities to conduct the prosecution of violations of the Act. But even if the Accord could be interpreted as an attempt to confer exclusive power upon the Province of New Brunswick to enforce the Fisheries Act or regulations made thereunder it appears that the Accord was entered into without

legislative into without legislative sanction or executive authority and therefore does not have the force of law. I therefore find that there is no merit in ground 2.

Counsel for CIL submits in support of ground 3 that prior to the amendment of the information made by the insertion of the words "being waters frequented by fish" the information disclosed no offence known at law and for that reason the trial Judge exceeded his jurisdiction in issuing the summons pursuant to the information.

S. 510 of the Criminal Code specifies the requirements of a valid indictment. By s. 729(1) that section is made applicable to informations in respect of proceedings by summary conviction and consequently to the information in the instant case. In my opinion CIL was reasonably informed of the nature and substance of the fourteen offences alleged against it. The information specified the time and place of the alleged offences and the section and subsection of the Fisheries Act alleged to have been violated. I am also of the opinion that s. 510(5) of the Criminal Code was applicable to render the information sufficient. That subsection reads:

510(5) A count may refer to any section, subsection, paragraph or subparagraph of the enactment that creates the offences charged, and for the purpose of determining whether a count is sufficient, consideration shall be given to any such reference.

In Regina v. Coté (1977) 33 C.C.C. (2d) 353 (S.C.C.), de Grandpré, J., after referring to the provisions of subsections (1) and (3) of s. 732 of the Criminal Code respecting the power of a summary conviction court to amend an information, said at p. 357:

Of course, s. 732 comes into play only if there is a defect in the information. Appellant submits that none exists, the words "without reasonable excuse" being brought to the attention of the accused by the specific reference to the section of the Criminal Code creating the offence. Appellant invokes s-s. (5) of s. 510, which also applies to informations:

.....

I agree with that submission; the golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial. When, as in the present case, the information recites all the facts and relates them to a definite offence identified by the relevant section of the Code, it is impossible for the accused to be misled. To hold otherwise would be to revert to the extreme technicality of the old procedure.

In my opinion, the information in the instant case was sufficient to charge CIL in the fourteen counts with offences against s. 33(2) of the Fisheries Act without any amendment being made and I would therefore hold ground 3 is without legal merit.

In my opinion, the application of Canadian Industries Limited for an order of prohibition is not supportable on any of the grounds upon which the application was based and accordingly should be dismissed.

